

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

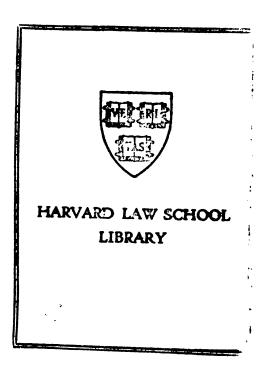
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + Refrain from automated querying Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/



HARVARD LAW LIBRARY



	-IOWA	

8	100	8	82 236	17	132 519	8	231 538	8 10	316	8	404 174	8 13	5
26 30	426 577	10	434	17	521	10	99	20	296	14	172	24	1
35	85	11	487	24	226	18	454	23	390	_		35	
35	271	12	115	_		19	303	37	508	8	406	_	
37	330	12	116	8	140	26	418	38	509	47	408	8	1
44	560	13	88	49	689	26	418	71	285	8	407	20	1
53	62	14	228	65	671	53	86	_		9	543	27	15
53	63	16	272	- 8	144	-		8	318	12	235	35	-
	17	16	274	11	364	8	239 145	9	401	18	18	8	1
8		17	383	11	366	11		-	419	8	416	9	- 2
22	21	17	385	11	512	8	252	8	322	21	185	-8	1
8	29	17	407	14	35	10	490	15	274	23	467	9	
9	77	17	411	20	443	8	260	8	331	35	26	12	4
8	33	20	288	36	247	16	364	9	96	51	185	13	4
30	20	20	289	88	512	39	86	- 9	98	51	186	17	
8	40	20	342	42	333	8	263	15	279	56	159	-8	8
9	118	22	145	52 64	157 330	16	140	33	269	- 8	420	41	2
50	560	22	394	-	_	16	449	43	543	18	47	8	. 6
31	532	26	346	8	148	16	490	52	72	18	50	29	4
8	45	30	548	11	547	18	268	65	127	18	451	- 8	5
9	265	34	195	8	155	18	275	8	334	38	55	9	
9	527	36	405	58	552	49	457	8	395	40	381	- 3	4
11	136	39	418	8	163	62	667	26	208	46	483		
ii	188	69	227	8	223	72	748	47	354	8	425		
20	72	73	316	8	230	- 8	274	48	493	15	561		
11	539	8	96	8	286	12	126	8	337	8	427		
52	52	10	287	11	136	21	280	9	218	11	78		
37	601	11	136	11	567	21	281	12	355	_	_		
38	115	11	152	26	45	8	277	15	433	8	434		
8	56	11	153	29	220	16	293	8	341	18	164		
5	105	13	481	31	118	18	235	14	198	_	446		
20	362	13	552	34	127	18	237	_	-	8	436		
16	93	19	487	34	128	22	20	8	347	21	281		
28	246	19	489	35	104	87	332	10	549	8	438		
38	480	26	301	35	256	8	284	20	250	11	145		
11	339	52	522	55	439	29	284	-	43	8	447		
8	62	52	523	8	193	35	104	8	352	13	107		
18	552	58	593	10	169	_		9	420	22	438		
_		59	147	10	170	8	286	10	589	29	459		
8	65 457	63	26	11	183	22	569	8	355	32	41		
9	328	66	242	15	385	30	294	10	89	8	459		
10	106	70	211 126	17	893	48	504 130	25	138	35	309		
14	59	75	392	21	58			45	234	37	640		
6	474			26	252	8	288	8	358	8	463		
30	562	8	106	- 8	207	8	538	9	121	29	165		
18	436	8	328	71	409	17	332	9	218	Н	474		
_		13	503	8	214	17	335	64	226	32	510		
8	72	18	68	54	329	19	99	66	184	42	19		
7	32	29	547	8	219	26	414	8	360	_	_		
_	35	39	385	8	189	66	473 589	17	519	B	475		
8	74	39	386	8	230	71	13	48	616	11	136		
11	8	43	341	8	286	_		60	96	8	477		
1	473	8	108	11	567	8	298	8	368	11	845		
6	186	9	58	29	220	12	234	18	4	15	89		
19	447	15	392	35	104	30	359	19	164	17	145		
8	77	36	650	35	256	65	355	31	341	17	373		
36	70	8	122	55	439	65	357	77	80	21	469		
8	79	8	116	70	608	8	304	8	373	32	42		
22	441	12	474	8	223	25	349	11	547	70	453		
18	498	14	370	51	326	29	451	_	_	-8	516		
17	629	16	219	62	88	72	13	8	380	8	474		
7	630	29	589			8	309	14	424 53	10	447		
0	129	34	218	8	229	9	52	20	385	32	510		
		40	551	8	189	9	180	39	507	42	79		
		58	384	8	286	20	431	_		8	517		
		8	126	11	567	8	313	8	396	45	211		
		8	427	29	220	20	477	8	563	8	519		
		11	78	35	104	66	525	11	90	48	367		
		8	129	35	257	Arts	-	8	402	8	521		
	1	41	151					17	519	9			
		57	258		- 1					9	445		

Gopyright, 1890, by Frank Shepard, Chicago. (Patent applied for.)



CASES IN LAW AND EQUITY

DETERMINED IN THE

SUPREME COURT

0 F

THE?STATEMIN 10WA.

BY W. PENN. CLARKE,

REPORTER.

VOL. VIII.

DAVENPORT:

PRINTING AND PUBLISHING HOUSE OF LUSE, LANE & CO.

1860.

Entered according to Act of Congress, in the year one thousand eight hundred and sixty, by

W. PENN. CLARKE,

in the Clerk's office of the District Court of the United States, in and for the District of Iowa.

Rec Gage 16. 1860



OFFICERS OF THE SUPPLEME COURT.



JUDGES.

How. GEORGE G. WRIGHT, Keosauqua, Chief Justice.

"WM. G. WOODWARD, Muscatine,
L. D. STOCKTON, Burlington,

JUDGES.

CLERK.

LEWIS KINSEY, Des Moines.

ATTORNEY-GENERAL.

SAMUEL A. RICE, Oskaloosa.

REPORTER.

W. PENN. CLARKE, Iowa City.

CASES

REPORTED IN

		•	
(AS	SES F	
_			HADE!
REPORTED	IN	THIS VOLUME.	ENTRA
		()	
			10
		لعد	
		•	Same against
A.	1	Cavender v. Smith et al	360
		Cavenor, Thruston v	155
Allen v. Newberry	65 .	Chadwick et al., Stewart et al.	468
Armstrong, Cameron, Admx.v	212		522
Armstrong v. Pierson	29	Churchill et al., Fulliam v	45
Anderson, Garnishee, Van-		Church, The State v	252
fossen v	251	Clark, Andrus v	475
Andrus v. Clark	475	Clark et al., Walker v	474
Arbuckle, James v	272	Clinch, The State v	401
Atkins v. M'Cready et al	214	Collins v. Ripley, Co. Judge	129
Ault, Sloan v	229	Cooley v. Hobart et al	858
_		Cotes & Davies v. Shorey	416
В.		Cressler, Moffitt v	122
D	000	Crocker v. Robertson	404
Baer, Likes v	368	Crogan, The State v	523
Bailey v. Harris	831	Crossman, Lowen v	325
Barrett, The State v	586	Curtis et al., Hubbard v	1
Barron et al., Burke v	182	D	
Bates v. Robinson	818	D.	
Bennett, Updegraff v	72 516	Davison, The Co. of Louisa v	517
Berner v. Frazier	77	Dean, Best v	519
Best v. Dean	517	Descelles v. Kadmus	51
Blair & Co. v. Marsh et al	144	Devitt, Cain v	116
Bond, The State v	540	Donaldson, Williams v	108
Borland v. the M. & M. R.R.Co	148	Donehey, The State v	396
Braddy, Lummery v	38	Drain et al. v. Mickel	438
Buel v. Lake	851	Drummond v. Stewart	341
Burch, Hagan v	809	Duncan v. Hobart et al	337
Burke v. Barron et al	182	Dungan v. Von Puhl	263
Burrows et al. v. Lehndorff	96		,
Butler, Seymour & Co. v	304	E.	
Butterworth, M'Call v	329	•	
,		Eckerson, Snell v	284
· C.		Edes, Loving v	427
		Edgar v. Greer	394
Cain v. Devitt	116	Edinger v. Henchler et al	513
Callendine, The State v	288	Eno v. Hunt	436
Cameron. Admx v. Armstrong	212		
Cameron v. Logan	484	F.	
Cass, Whipple v	126		

Ferry v. Page	455	Lake, Bael v	561
Pink v. Pink	313	Levi V. Karrick & d	150
Foley v. Howard	56	Likes v. Baer	268
Frazier, Berner V.1	77	Lockman, Kilbourne v	380
Frasier, Lyons v	249	Logan, Cameron v	434
Freeman, The State v	428	Loving v. Edes	427
Fredericks, The State, for the		Lowen v. Crossman	825
use of, &c., v		Lummery v. Braddy	88
Fuller, Parr v	347	Lyons v. Frazier	849
Fulliam, Churchill, et al. v.	45	Lyons v. Tevis	79
,		•	
G.		¥.	
Gallup et al., Terpenning v	74	Malcolm, The State v	418
Games v. Robb	193	Marsh et al., Blair & Co. v	144
Garvin v. Wells	286	Marion Co. v. Stanfield et al.	406
Goodpaster v. Voris et al.,	8 34	McCall v. Butterworth	329
Gove, et al., Temple v	511		208
Greer, Edgar v	394	McCorkle, Cherry, Guardian v.	522
		McCready, et al. Atkins v	214
Н.		Mickel, Drain, et al. v	438
		Moffit v. Cressler	122
Hogan v. Burch	809	Morgan, The State v	399
Hagge, Veiths v	163	Morford v. Unger	82
Hall, Willey v Hammond et al., Tomlinson v	62		
Hammond et al., Tomlinson v	40	N.	
Harris, Bailey V	831	V D	-
Harris et al. v. Stone	822	Nevan v. Roup	207
Hayden, Newell v	140	Newberry, Allen, v	65
Hedge & Co., Platt v386	,002	Newell v. Hayden	140
Henchler et al., Edinger v	518 298	Nichols, Pixler v	106
Higgins v. Reed et al	402	Р.	
Hixon, Pense v	358	r.	
Hobart et al., Duncan v	336	Page, Ferry v	455
Howard, Foley v	56	Partridge v. Wilsey	459
Hubbard v. Curtis et al	1	Pense v. Hixon	482
Hunt, Eno v	435	Pickerell v. Carson	544
Hurley v. The Dubuque Gas	200	Pierce v. School Dis. No. 4 &c	227
Light and Coke Co	274	Pierce, The State v	231
2.624 424 444		Pierson, Armstrong v	29
J.		Pittman & Bro. v. Searcey	852
		Pixler v. Nichols	106
James v. Arbuckle	272	Platt v. Hedge & Co89	
Johnson, The State v	525		,
Jones, Young v	219	R.	
		D.3.4 7. 7	
к.			17
Vadmus Describes w	E1	Rankin, The State v	855
Kadmus, Descelles v	51	Reed et al., Higgins v	298
Karrick et al., Levi v	150 380	Richardson & Co. v. The Bur-	000
Kilbourne v. Lockman	281	lington & M. R. R.Co.	260
Kimmell, Snell v	521	Ripley, Co. Judge, Collins v	129
King v. Kinney	521	Robb, Games v	198
Kinney, King v		Robertson, Crocker v Robinson, Bates v	404
L.		Rogers, School Dis. No. Two	318
 -		&c. v	316
Lahee, Ralston v	17	Rosseau, The M. & M. R. R.	5.0
Lehndorff v. Burrows et al	96	Co. v	378
	-	*****************	

Boup, Nevan v	207	The State v. Clinch	401
Ruhl, The State v	447	The State v. Croghan	528
		The State v. Donehey	396
8.		The State v. Freeman	428
		The State v. Johnson	525
Sater, The State v	420	The State v. Malcolm	418
Saunders v. Bentley	516	The State v. McClintock	203
Savery v. Savery	217	The State v. Moran	899
Savery v. Spaulding	239	The State v. Pierce	231
School Dist. No. Four, &c.,	200	The State v. Rankin	355
	227	The State v. Ruhl	447
Pierce v		The State v. Sater	420
· · · · · · · · · · · · · · · · · · ·	316	The State v. Seaton	188
v. Rogers	352		477
Searcey, Pittman & Bro. v	138	The State v. Shelledy	
Seaton, The State v		The State v. Williams	588
Seymour & Co. v. Butler	804	The State v. Wilson	407
Shelledy, The State v	477	The State for the use of, &c.	*
Shellenberger v. Ward	425	v. Fredericks, et al	538
Shorey, Cotes & Davies v	416	Tomlinson v. Hammond et al	40
Sloan v. Ault	229	Turner, Zugg v	22 3
Smith at al., Cavender v	360		
Snell v. Eckerson	284	U.	
Snell v. Kimmell	281		
Spanlding, Savery v	239	Unger, Morford v	82
Stanfield et al., Marion Co. v.	406	Updegraff v. Bennett	72
Stewart, et al., v. Chadwick			
et al	463	v.	
Steward, Drummond v	341		
Stone, Harris et al. v	322	Vanfossen v. Anderson, gar-	
•		nishee	251
Т.		Veiths v. Hagge	163
		Van Puhl, Dungan v	268
Temple v. Gove et al	511	Voris et al., Goodpaster v.	334
Terpenning v. Gallup et al.	74	•	
Tevis, Lyon v	79	w.	
The Bank of the Old Domin-			
ion v. The D. & P.RR.Co	277	Walker v. Clark et al	474
The Burlington & M. RR. Co		Ward Shellenberger v	425
Richardson & Co. v	260	Wells, Garvin v	286
The Dubuque Gas Light &		Whipple v. Cass	126
Coke Co., Hurley v	274	Willey v. Hall	62
The Dubuque & P. RR. Co.	212	Williams v. Donaldson	108
The Bank of the Old		Williams, The State v	538
	277	Wilsey, Partridge v	459
Dominion V	211		408
The M. & M. RR. Co., Bor-	140	Wilson, The State v	407
land v	148	Y.	
The M. & M. RR. Co. v. Ros-	070	1.	
Seetl	878	Vanna - Janes	01.0
The Co. of Louisa v. Davison	517	Young v. Jones	219
The State v. Barrett	586	-	
The State v. Bond	540	Z.	
The State v. Callendine	288	<u>- </u>	
The State v. Cavenor	155	Zugg v. Turner	228
The State v. Church	252	i	

CASES

IN

Zaw and Equity,

DETERMINED IN THE

SUPREME COURT

O F

THE STATE OF IOWA.

DES MOINES, JUNE TERM, A. D., 1859.

In the Fourteenth Year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.

" WM. G. WOODWARD, JUSTICES.
L. D. STOCKTON,

HUBBARD v. CURTIS et al.

The creditor of one partner may levy upon the interest of his debtor in the partnership.

But the creditors of the firm, are entitled to be first satisfied from the partnership funds, and the separate creditors from the individual funds.

This latter rule, however, is only applied where there is a deficiency in one of the funds.

Where a partnership is insolvent, or where its solvency is doubtful, a court of equity will restrain a sale of the partnership property under an execution against an individual member of the firm, until the settlement of the partnership affairs, in order to ascertain whether the debtor-partner has a real and valuable interest over and above the liabilities of the firm.

Vol. VIII.—1

But whether the sale be stayed until the partnership accounts be settled in equity, or not, the purchaser at an execution sale against a member of the firm, takes only the interest of the judgment debtor in the partnership; and takes it as the partner held it, subject to the payment of the partnership debts.

Where an execution against a member of a firm, is levied upon the partnership property, the officer is not entitled to take possession of such joint property; nor where the interest of the debtor in the firm, is sold before a settlement of the partnership affairs, does the officer deliver over the property to the purchaser.

In such a case, the purchaser takes nothing more than an interest in the partnership, which is not tangible, and cannot be made available, except under an account between the partner and the partnership; and the purchaser will be restrained from proceeding to obtain possession of the partnership property, until such an account has been taken.

Where partnership property is levied on to satisfy an individual debt of a member of the firm, a stay of the sale under the execution is not allowed, on the ground that the interests of the other partners will be affected by such sale, but is granted to ascertain and protect the rights of the joint creditors.

Nor is an account taken in such cases, solely to ascertain whether there is a surplus interest in the debtor-partner; but it being found that the joint effects are insufficient, or only sufficient, to meet the demands of the partnership creditors, the object is to protect the joint creditors, and direct the funds to their payment.

In a bill in equity to restrain, by injunction, the sale of partnership property, under an execution against an individual member of the firm, it is not necessary to aver positively that the co-partnership is insolvent. It is sufficient, if from the allegations of the bill, and the facts stated, an alleged insolvency is apparent.

Nor is it any ground of objection to such a bill, that the complainant does not seek a stay of the sale, merely to ascertain the debtor's interest in the partnership, but asks a perpetual injunction. The court having cognizance of the case, to take an account of the partnership affairs, and finding it insolvent in fact, must necessarily make the injunction perpetual in the end, since, in such a case, there is no interest remaining in the debtor-partner to sell.

Where a temporary injunction, staying a sale of partnership property under an execution against an individual member of the firm, was dissolved, and thereupon the property was sold to one of the respondents; and where, on the final hearing of the cause, it was determined that the debtor-partner had no interest in the firm, it being found insolvent, and it was decreed that the purchaser at the sale should restore to the receiver of the partnership, the property so purchased; Held, That there was no error in the proceeding.

Where it was objected to a bill in equity, to dissolve a partnership, and

settle up its affairs, that no master in chancery had been appointed to take an account of the partnership debts; and where it appeared that the record of the cause was not complete, and the final decree implied that some order was taken to ascertain and settle the partnership debts, the appellate court refused to interfere with the decree.

Where a court of equity has made a final decree, dissolving a partnership, and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, proceedings may be taken, with proper notice to the respondents, to ascertain the joint debts of the firm.

A bill to restrain the sale of partnership property, under an execution against an individual member of the firm, and for a dissolution and settlement of the partnership, for the purpose of ascertaining the interest of the separate debtor in the firm, may be filed either by the debtorpartner, or the other partners—by the joint or the separate creditors—or by the purchaser himself, where the partnership property has been sold, prior to a settlement of the affairs of the partnership.

Appeal from the Dubuque District Court.

MONDAY, APRIL 4.

In Equity. The separate creditors of Orlando Curtis levied on personal property of the firm of Hubbard & Curtis, of which he was a member. Hubbard, the other partner, thereupon brings his bill to cause the partnership property to be first applied to the payment of the debts of the firm.

The complainant represents that, on the 26th of November, 1856, the firm, composed of Hubbard, Curtis & Smith, was dissolved, and that of Hubbard & Curtis was formed, in the lumber business, to continue four years and one month—they putting in, as capital, their interest in the former firm, estimated at \$5,000 each, but whether more or less; that the firm was indebted in about \$22,000, and the assets had stood at about \$31,000, but owing to the depreciation of the property, and the failure of debtors, it would not realize more than \$20,000, if compelled to be reduced to money as the debts mature; and that, as at present situated, the assets are insufficient to pay the indebtedness of the firm, but that it is impossible to determine how the bal-

ance would stand, on a closing up, on account of the nature of the assets and credits.

The petitioner alleges, that at the August term, 1857, the defendants, Wilcox, Perry & Eacher, obtained two judgments against the said Curtis, and John Gove & Co. obtained another; that Hayden, the sheriff, had levied the executions upon the stock of lumber of the firm, and had advertised the same for sale; and that he had seized and taken possession of the lumber, thus hindering him from exercising any control, and breaking up the business, and, in effect, dissolving the partnership.

He further represents, that as a member of the said firm, he has a lien upon the property belonging to the firm, to secure the payment of the debts of the firm, (the greater part of which are due for the lumber now in possession), and that the creditors of the firm are entitled to the benefit of such lien of the partner, to secure their joint claims, in preference to the creditors of said Curtis, and before they can proceed against the partnership funds. He therefore prays that an injunction may issue, restraining the above defendants, and Hayden, the said sheriff, from taking or selling, or in any way interfering with the property of the firm: and to the end that the rights and equities of all the parties may be ascertained, that the court would take cognizance of the matter; that the firm of Hubbard & Curtis may be declared dissolved; that a receiver may be appointed to wind up the affairs of the said firm, and take charge of all the assets of the same; and that he be instructed to pay the debts of the firm as soon as may be, out of the said property and assets.

The defendants, Wilcox, Perry & Eacher, and Hayden, answer, admitting their judgments recovered, as alleged, to the amount of \$2033,84, and the levy of the executions; and they insist upon the right of the sheriff to sell the property taken on their executions. And the firm of Wilcox, Perry & Eacher afterward answer, denying the insolvency of the firm of Hubbard & Curtis, and also charging

a combination between those two to defraud the creditors of Curtis, and the firm of H. & C., and these defendants especially.

The defendants, Gove & Co., filed a demurrer, upon which the record shows no action. They also filed an answer, but the final entry of decree states that they appeared by counsel, and made known to the court that they did not resist a decree as prayed for, and no question is made, arising upon their answer separately.

Upon the motion of Wilcox, Perry & Eacher, the injunction was dissolved, so far as to allow the sheriff to proceed and sell the property attached, subject to the liability to pay the partnership debts of the firm of Hubbard & Curtis. And on the final hearing, it was decreed that the partnership between Hubbard & Curtis be dissolved; that the affairs of said firm be wound up; that the appointment of John Edwards as receiver of that firm, heretofore made, be confirmed, and that he, as such receiver, be authorized and commanded to take possession of all the assets of the firm, and convert them into money, and collect all dues, and pay the debts of the firm in the order following: of this suit and the expenses of the trust. 2. All claims secured by liens upon property of the firm. 3. The claims of all other creditors of the firm, pro rata. 4. judgments of Wilcox, Perry & Eacher against Curtis; and any balance remaining, to be held subject to the order of the court. And it is further ordered that the sheriff. Havden, deliver to the receiver any property held by him under the executions above named, and he is enjoined from selling it, or interfering in the disposal of it; and he is directed to pay to the receiver the money paid by the receiver to him since the commencement of this suit. decreed, that Wilcox, Perry & Eacher deliver to the receiver all lumber, or other property, bid off and purchased by them, under the above judgments and executions against Curtis, and they are enjoined from further interfering in relation to the same. The respondents, Hayden and Wilcox, Perry & Eacher, appeal.

Cooley, Blatchley & Adams, for the complainant.

Each partner has a lien on all the partnership property, and it is his right to insist that all partnership property be applied in payment of the partnership debts, and to the purposes contemplated by the partnership agreement. Story on Part., sec. 97. *Pierce* v. *Wilson*, 2 Iowa, 20.

If a partner, or any person claiming under a partner, as a creditor, assignee or vendee, seeks to divert any of the partnership property from partnership uses, equity will intervene, and enforce the partnership lien, and see to it that the property is applied in satisfaction of such liens. 1 Eden on Injunctions, 53.

The sheriff, under an execution against a partner, may seize the partnership property, and sell the interest of the debtor-partner therein, and deliver the property to the purchaser; but equity will intervene for the benefit of the debtor-partner, as well as others interested, and enjoin a sale until an account of the partnership can be taken, and his interest ascertained. Story on Part., sec. 264; Story, Eq. Jur., sec. 678; Place v. Sweetzer, 16 Ohio, 142; Washburn v. Bank of Bellows Falls, 19 Vt., 278; Cammack v. Johnston, 1 Gr., Ch., (N. J.,) 163; Newhall v. Buckingham, 14 Ill., 405; Moore v. Sample, 3 Ala., (N. S)., 319; Willards Eq., 7245; 12 Wend., 134.

So, if the sheriff seizes partnership property upon an execution against one partner, equity, upon a bill to wind up the partnership and to appoint a receiver, will intervene by injunction. Witter v. Richards, 10 Conn., 40; Filley v. Phelps, 18 Conn., 299; Story on Part., sec. 264; 1 Eden on Injunctions, 53.

Equity should intervene in such cases: 1. To prevent the sacrifice of the debtor-partner's interest, for there is the same reason for equitable action now as in the case last before instanced. 2. To preserve the other partner's lien; for, otherwise, he might have to follow the property into the hands of vendees of the sheriff, and their successors,

and be in danger of losing the property; 3. Because equity must so intervene, in order to perform what it has undertaken, viz: to wind up the partnership. Equity cannot wind up the partnership without taking possession of the partnership property; and it cannot do this, without enjoining the sheriff, and taking the property out of his hands. If equity will not do this, it should not undertake to wind up partnerships while any of the property is in the hands of sheriffs.

The object of the creditors of the debtor-partner is to convert his interest in the partnership property into money, to be applied on their debts; the object of the other partner is to convert this property into money for himself, the firm, and the firm creditors. The objects of both classes of creditors can be better accomplished by a court of equity than of law. The interests of all parties concerned are protected, and those of each and every party are better cared for than they could be at law.

Griffeth & Knight, and Wm. T. Barker, for the appellants.

- 1. Execution against one partner may be levied upon the joint property of the partnership, and the sheriff may take possession thereof, and sell the interest of defendant in execution therein, and deliver possession to the vendee, who will take, as tenant in common with the other partners, subject to an account between the partners, and the payment of the partnership debts. *Phillips* v. *Cook*, 24 Wendell, 389; Willard's Eq. Jur., 723, 724; Story on Part., secs. 260, 263; Code of Iowa, sec. 1971.
- 2. And a court of equity will not enjoin against such sale. Code of Iowa, sec. 1917; Payne v. Moody, 2 Johns., Ch., 548; Brewster et al. v. Hammet & Lane, 4 Conn., 540; Litler v. Walker, 1 Freemans Ch., 77; Phillips v. Cook, 24 Wendell, 389. Section 1917 of the Code of Iowa was made to settle this question; and the defendants, Wilcox, Perry & Eacher were entitled to the security by bond there given.

But plaintiff's counsel say, a court of equity will stay such sale, and cite authorities. But the authorities cited by plaintiff will be found, on examination, to go only to the point that the sale will be stayed till an account be taken to ascertain the interest of defendant in execution in the partnership property levied on; the said property in the meantime remaining in the custody of the sheriff, with the right to sell the interest of defendant in execution therein, as soon as that interest is ascertained; and this is done only where it is made to appear, that the interest of the other partners will be damaged by a sale made prior to the taking of an account. This is not the case at bar. The plaintiff in the case under consideration, does not seek a stay of the sale till an account be taken, leaving the property in the meantime in the possession of the sheriff. He does not even ask an account to be taken to ascertain the interest of each partner; nor does he allege, or show, that either his interest, or the interest of his co-partner, the defendant in execution, will be damaged by the sale. But he seeks a perpetual injunction against the sale; and, more than this, he asks that a receiver be appointed, and that the sheriff be required to surrender the property levied on, to the receiver; and that the receiver be authorized to sell the property so taken from the sheriff, and to apply the proceeds thereof to the payment of the partnership debts; and all this, without alleging or showing that any damage will arise, either to his interest, or to that of the defendant in execution, by a sheriff's sale at law; and without asking or seeking an account of the partnership funds, its assets and liabilities—without a reference to a master in chancery to ascertain the liabilities and assets of the firm-and without a competent allegation or showing of insolvency, without which the joint creditors are not allowed a preference over individual creditors. And this is what has been done by A perpetual injunction against the the court below. sale has been granted; a receiver appointed; the sheriff has been required to deliver up possession of the property

levied on, to the receiver; the receiver has been authorized to sell the same; and, without the taking of an account—without a reference to a master to ascertain the liabilities, before whom these defendants would have had an opportunity to appear and contest fraudulent or pretended claims, the receiver has been authorized to appropriate the proceeds of the property taken from the sheriff, to the payment of the partnership creditors, and, in doing so, to "go it blind."

The authorities cited by the plaintiff do not approach these positions; they do not touch this case. There is no authority in all equity jurisprudence that countenances, or will wink at such proceedings. But these authorities, worthless as they are so far as this case is concerned, are overborne by contrary decisions and principles of jurisprudence.

4. This, then, is not a case where one partner seeks a stay of an execution sale at law of the interest of a co-partner in the partnership property, till an account be taken to ascertain that interest. It is a case where one partner seeks to defeat a creditor of his co-partner, in subjecting his (the debtor partner's), interest in co-partnership property to the payment of his individual debt. And to effect this, he ostensibly claims, (though in collusion with the debtor partner, as we allege), an appropriation of the partnership property to the payment of the partnership creditors first, and in preference to the individual creditors.

The principle of paying joint creditors out of joint property, and individual creditors out of individual property, arose (in England), in bankruptcy. It is applied only in the cases of the insolvency of the partners, or the death of one partner; and while the partnership, or partners, are solvent, and the business going on, a court of equity will not interfere and apply the principle against individual creditors. Story on Part., secs. 358, 361; note to sec. 97; note to sec. 326; Ib., note 1 to sec. 326; ex parte Williams, 11 Vesey, 3; 1 Barb., 480; Ketchum v. Durkee, 3 Ib., 46; Kirby v. Schoonmaker, 6 Vesey, 119, quoted in note 2 to Vol. VIII.—2

- sec. 97 of Story on Part.; 3 Kent, (marginal page), 64; Wilcox v. Kellogg, 11 Ohio, 399. The decision of Justice Redfield in Washburn v. The Bank of Bellows Falls et al., 19 Vt., 278, is based upon the insolvency of the partners.
- 5. Until the contrary is shown, solvency is presumed, and partners considered as having equal interests.
- 6. The individual solvency of the members of the firm of Hubbard & Curtis, is not questioned.
- 7. Is it alleged, or shown, that the firm of Hubbard & Curtis is insolvent? It is not fairly and competently alleged. It is denied by these defendants, under oath. At the time the executions were levied, Nov. 10, 1857, there is nothing that shows insolvency. At the time this suit was brought, Dec. 26, 1857, the solvency of the firm is shown by the first report of the receiver. There is no evidence of insolvency to overcome a bare denial, much less to overcome a denial under oath, which, this court has held more than once, must be met with more than the testimony of one witness.
- 8. When equity is invoked to apply the principle of paying joint debts out of the joint property, to the exclusion of individual creditors of one partner, it must not only be shown that the partnership and the partners are insolvent, but it must also appear that the joint creditors have no remedy at law. Kirby v. Schoonmaker, 3 Barb. Ch. 50. The reports of Iowa, over and again, affirm that old first principle in equity jurisprudence: that where there is a remedy at law, equity takes no jurisdiction. The joint creditors of Hubbard & Curtis have their remedy at law; and, indeed, they are not parties to this suit, and seek no relief at the hands of this court.
- 9. The sale of partnership property to a stranger, or even to a partner of the same firm, passes the property free from all liability to the payment of partnership debts. Story on Part., secs. 358, 359, and sec. 97 and note; 3 Kent's Commentaries, (8th ed.) marginal pp. 65, 78, 79; 11 Vesey, 3; ex parte Williams, 1 Barbour's Ch., 480;

Ketchum v. Durkee, 13 Ala., 837; Reese v. Bradford, 3 Barb. Ch., 46; Kirby v. Schoonmaker, 6 Vesey, 119; Wilcox v. Kellogg, 11 Ohio, 394.

WOODWARD, J.—The record, as contained in the transcript, is imperfect, in not stating some of the steps in the progress of the cause. Thus, there is no record of the first appointment of the receiver; and several proceedings are referred to, in the final decree, of which there is no mention in the progress of the cause. But it is probable that these, or some of them, were omitted as having no important bearing on the result. The bill was filed in December, 1857, at which time the injunction was allowed. In January, 1858, the receiver gives bond, and, in February, he makes a first report. On motion, the injunction is dissolved so far as to allow the sheriff to sell, but holding the proceeds liable to the payment of the joint debts, if it should be so decreed. Then the final decree orders the money to be so applied, and perpetuates the injunction. Curtis filed an answer admitting the matter of the bill, and consenting to a decree in accordance therewith. The final entry states that Gove & Co., who had filed a demurrer and an answer, appeared by counsel, and orally stated that they did not resist a decree, such as was prayed for. A judgment was recovered by C. W. & S. L. Keith against said Curtis. which is not regularly introduced into the pleadings, but as a portion of the property of the firm was attached in that suit, it is agreed by counsel that if it is finally held, that the judgments of Wilcox, Perry & Eacher should be paid from the assets of Hubbard & Curtis, then the court may also decree the payment of the judgment of Keith. These circumstances and facts are here mentioned, either to explain the state of the record, or the case in relation to them, or to dispose of them at once, as having no important bearing in the cause.

Of this latter character, is the matter of the sale to Amsden. As the property came back into the hands of the

firm, and stands with the rest of their assets, and constitutes a part of them, either by a cancelation of the original sale, or by a re-sale, (and which seems immaterial), no question of consequence arises in relation to it, and the subject does not appear to have any bearing in the case, and may be dismissed without further remark.

• The true questions arising in the case, are upon the course of proceedure, and the rights of the parties, when the separate creditor of a partner levies upon, or aims to reach, the interest of that partner in the joint property; and what are the rights of the joint creditors, and how are they to be enforced?

Two propositions are familiar to all. That the creditor of one partner may levy upon the interest of his debtor in the firm; and that the creditors of the firm are entitled to be first satisfied from the partnership funds, and the separate creditors from the individual funds. The application and test of this second rule, arises only where there is a deficiency in one of the funds. Consequently, the doctrine had its origin under insolvent and bankrupt laws. It is not confined to cases actually arising under such laws, but requires an actual insolvency as the ground of its application. This is the usual mode of stating the rule, but it is not strictly true, for absolute insolvency is not required. If, for instance, a firm is just solvent, and no more, having just sufficient to pay its creditors, the creditors of individual partners could not come in. And so it would be of the separate fund.

In the present case, the creditors of Curtis alone levied on partnership property. Hubbard, his partner, in behalf of the firm, and of the creditors of the firm, obtained an injunction to stay the sale. On this point, there is a difference among the authorities. It is upon the question, whether the court will stay the sale, and throw the burden upon the creditor levying to wait the settlement of the partnership affairs, to ascertain whether the debtor-partner has a real and valuable interest, over and above the liabilities of the firm; or

whether the officer shall proceed to sell, letting the purchaser buy at his own risk, and he take the burden of undergoing a settlement of the partnership, and take according to the result—nothing, if there be no balance due the debtor-partner, and something, if there be a balance.

That the court would not stay a sale, is held in Litler v. Walker, 1 Freem. Ch., (Miss.,) 78; by Chan. Kent, in Moody v. Paine, 2 Johns. Ch., 548; and in 3 Kent's Com., 65, note (f), Chancellor Kent appears to have been constraired by prior cases in his own state, and in the passage last above referred to, he notices the position of Judge Story, and concedes that the other is the more suitable rule. Sougham v. Carter, 12 Wend., 131; Philips v. Cook, 24 Ib., 390; Browster v. Hammett, 4 Conn., 540; Parker v. Pistor, 3 B. & P., 288.

On the other side of the question are: 1 Eden on Inj., 53 and note; Collyer on Part., sec. 340, citing Taylor v. Field, 4 Ves., 396; S. C. 15 Ves., 559, note; Bevan v. Lewis, 1 Sim., 376; Gow on Part., (3d Ed.) 144; Collyer sec. 831, states this case precisely, citing 1 Mad. Ch. 131, (which Mr. Kent says is not supported by his authorities); Lowndes v. Saylor, 1 Madd., 423; Newell v. Townsend, 6 Sim., 419; In re Smith, 16 Johns., 106; Newhall v. Buckingham, 14 Ill., 405; Place v. Sweitzer, 15 Ohio, 142; Washburne v. Bank of B. Falls, 19 Vt., 278; 1 Story Eq., secs. 675, 678, et seg.; Story on Part., secs, 97, 260, et seg.; McDonald v. Beach, 2 Blackf., 55.

Some of the above cases are at law, but they discuss questions and cases bearing closely upon the pure equity view of the subject. Such is the above case of *Phillips* v. *Cook*; and in *Sougham* v. *Carter*, though at law, Ch. J. SAVAGE says: The court would stay a sale on execution to allow an account to be taken in equity, and if this was not done, yet, only the interest of the partner would be sold. But, according to the rule in equity, he says, the partnership accounts should all be liquidated before a sale on execution, and cites 16 Johns., 106; and 2 Ves. & Bea., 300. In either case,

however, whether the sale be stayed till the accounts are settled in equity, or not, all the books agree that the purchaser takes only the interest of the judgment debtor, and takes it as he held it, that is, subject to the payment of the partnership debts.

A question standing still earlier in the order of proceeding, has been whether the officer shall take actual possession of the joint property, and, on a sale, deliver it to the purchaser, or whether he only lets in the purchaser to a tenancy in common with the other partner; and perhaps the weight of authority favors the actual taking and delivering, and some of the cases have held what seems rather strong and hard doctrine on this subject. But, however this may be, it is agreed that the purchaser takes, subject to the settlement of the partnership, and if there is no surplus belonging to the debtor, he takes nothing, and the property is taken from him by the joint creditors. See the above authorities.

If the property is sold before an account is taken, of course the interest of the debtor is liable to be sacrificed, on account of the uncertainty, and the purchaser is burdened with the settlement of the business of the firm. mode of proceeding, the creditor takes this upon himself, and if there is no balance, there is nothing to sell. The rule is clearly summed up and stated in Eden on Inj., 53-5. Having stated that the subject had undergone an elaborate discussion in a case in the Exchequer, Taylor v. Field, 5 Ves., 396, and 15 Ves., 559, note, he states the conclusion as there "Whether the partner, for valuable consideration, sells his interest in the partnership, or his representatives take it upon his death, or a creditor takes it in execution, or assigns under a commission, the party coming in in the right of the partner, takes nothing more than an interest in the partnership, which is not tangible, and cannot be made available, except under an account between the partnership and The creditor will, accordingly, be restrained from proceeding, until such account has been taken." This seems to be the more consistent rule, and supported by the

greater weight of authority. The following cases, also, bear upon the subject: Fox v. Hanberry, Cowp., 445; Richardson v. Gooding, 2 Vern., 293; West v. Skipp, 1 Ves., 239; Hankey v. Garrett, 3 Bro. C. C., 457; and 1 Ves. Jr., 236; particularly, Barker v. Goodwin, 11 Ves., 78; Young v. Keigleby, 15 Ves., 557; Dutton v. Morrisson, 17 Ves., 193.

In reply to suggestions of the respondent's counsel, we would say, that the stay of sale is not allowed upon the ground that the interests of the other partners will be tlamaged by a sale, but it is to ascertain and protect the rights of the joint creditors. Again: the account is not taken solely to ascertain whether there is a surplus interest in the debtor, as counsel seem to suppose; but it being found that the joint effects are not sufficient, or only sufficient, to meet the demands of the joint creditors, the object is to protect these, and direct the funds to their payment.

It is objected that the complainant does not distinctly allege insolvency, and that he does not seek a stay of sale merely to ascertain the debtor's interest, but asks a perpetual injunction. It is true that the bill is not as full and explicit as it might well have been; but, what with the facts stated, and the averments of the petition, an alleged insolvency is apparent. He avers that the assets are not sufficient to discharge the indebtedness, and upon this basis he asks a perpetual injunction. The court having cognizance of the case to take an account of the partnership affairs, finding it insolvent in fact, must necessarily make the injunction perpetual in the end, since there was no interest remaining in the debtor, to sell.

It appears, that in the present case, the court dissolved the injunction, so that the officer proceeded to sell, and, therefore, it is questionable whether the point is properly made as to whether an injunction should be allowed to stay a sale. Yet the whole proceeding is so involved, one part with another, that we have given attention to it. At the sale, the respondents, Wilcox, Perry & Eacher, became the purchasers; and it being ascertained that there is no interest in the debtor for

his separate creditors, they are directed in the decree to restore to the receiver the property purchased. This is what we have remarked would be the case with any other purchaser, where it should be ascertained that there was no surplus interest in the debtor-partner.

As to the objection that no master in chancery is appointed to take an account of the partnership debts, or any tribunal or proceeding, such that the defendants could appear and contest claims set up, it is to be remarked that the record is not full. There is an evident omission to state some of the steps in the course of the proceeding, and the cause seems to have been prepared to bring to this court It is a matter of course that the certain question, only. court should take some order to ascertain the true joint liability; and though the record as presented to us, fails to show what this was, (as in some other respects also), yet, as the final decree implies that some order was taken, we cannot see our way clear, to say there was error, either in what was done, or what was omitted to be done. If, in truth, the court has not judicially ascertained the joint liabilities which the receiver is directed to pay, this should still be done, with proper notice to the defendants,

It has been remarked that insolvency is fairly and sufficiently alleged, and we think it is proved, too. It would not give a just view to regard the first report of the receiver, alone, for this is but a general showing of the state of the firm, at his appointment, setting down the lumber at cost, and the debts and liabilities both ways at their face; whilst the second report is made after the receiver had had time to ascertain the true condition of things, and in truth, has relation to the time of his appointment. This shows the actual state of the firm much more truly than the first.

Finally, it seems that the bill in such a case, may be filed either by the debtor-partner, or the remaining partners—by the joint or the separate creditors—or the purchaser. Story on Part., section 263; 3 Kent, 65, note; Washburn v. Bank of Bellows Falls, 19 Vermont, 278. This

last case says that the partnership creditors have only to make out a *prima facie* case of insolvency. And Lord Rosslyn said that the principle of distribution to joint and separate creditors, involved in these cases, was applicable not only in bankruptcy, but upon general principles of equity. 3 Ves., 240; 3 Kent, 66, note.

In conclusion, we are satisfied that the bill was correctly sustained, and that there is not error in the final decree. If there was a want of proper proceeding in ascertaining and settling the claims of the partnership creditors, it is not made to appear; and as the record sent up manifestly omits some portion of the proceedings, we cannot infer that the proper measures were not taken.

The decree of the district court is affirmed.

RALSTON v. LAHEE.

An infant defendant is as much bound by a decree in equity against her, as a person of full age; and, consequently, if there be an absolute decree against a defendant who is under age, he or she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it—as fraud, collusion or error.

To impeach a decree in equity, against an infant, on the ground of fraud or collusion, the infant may proceed either by bill of review, or by original bill. To impeach it on the ground of error, the infant may proceed by original bill, and he is not obliged to wait, for that purpose, until he has arrived at the age of twenty-one years.

In ordinary cases, where an infant is allowed time, after her arrival at the age of twenty-one years, to show cause against a decree, the decree, in such cases, is deemed complete, but the infant has the time allowed to show cause against it. If no cause is shown, within the time specified, the infant is bound.

After the infant comes of age, and before the decree is made absolute, she may, as a matter of course, on motion, obtain leave to amend the answer filed by her guardian, or to put in a new one. By the new, or amended answer, she may make a better defense, and support that defense by new evidence; and, for that purpose, may file a bill of discovery.

An infant defendant, wishing to make a new defense to a decree in equity, Vol. VIII.—3

8 17 136 310

must apply to the court as early as possible, after obtaining the age of twenty-one years; for if she is guilty of any *laches*, her application will be refused.

An infant defendant may either impeach a decree in equity, on the ground of fraud or collusion between the complainant and her guardian, or she may show error in the decree. She may also show that she had grounds of defense, which were not before the court, or were not insisted on at the hearing; or that new matter has subsequently arisen, upon which the decree may be shown to be wrong.

Where an erroneous decree has been obtained against an infant, and the error is not in the judgment of the court, but in the facts on which the judgment is founded—as where there has been fraud or collusion between the complainant and the guardian ad litem, or where there has been any deception, or any surprise, upon the court, the infant may, either during infancy or afterwards, investigate the decree by a bill of review, or by original bill; and this, although the ground of complaint against the decree, is confined to error.

In such cases, the proceeding on which the decree is founded, is treated as fraudulent—it being considered fraudulent to take advantage of the incompetency of the infant to defend herself.

An infant is not bound by admissions made in his or her behalf, unless such admissions are for the benefit of the infant.

Where there is an infant defendant, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of adults, must be proved against the infant.

There can be no valid decree against an infant, by default, nor on the answer of a guardian.

But where in a proceeding to reach the equitable interest of a judgment debtor in real estate, against the debtor and his infant daughter, in whose name the title had been taken, the guardian ad litem of the infant, in his answer, admitted the judgment against the father—that execution issued thereon, had been returned "no property found"—that the father had no property out of which the judgment could be satisfied—that the said infant was the daughter of the said judgment debtor—and that the title to one of the lots in controversy, was in the said infant—and denied the other allegations of the bill; Held, That as the substantial matters admitted in the answer of the guardian, were matters of record, the court could not presume that the decree was rendered on the admissions of the guardian; and that those admissions did not prejudice the rights of the infant.

A guardian ad litem may be appointed, either on the motion of the plaintiff, or the defendant, in an action, but the court will not permit an adverse party to select the guardian for the infant.

The fact that a guardian ad litem, at the time of his appointment, and at

the date of the decree, was interested against the infant in the subject matter of the controversy, is not such conclusive evidence of fraud as to authorize the setting aside of the decree, for that reason alone, unless it is shown further, that the guardian made use of his position, to work some injury to the interest of the infant.

Infants are as much bound by the conduct of those who conduct their case as adults, provided their conduct be bona fide; and where the solicitor of an infant, consents to take the evidence in a proceeding in chancery by affidavit, instead of depositions upon interrogatories, the infant will be bound thereby.

Where a decree has been rendered against an infant, and she afterwards succeeds in showing that it ought not to have been rendered, the court will place her, as far as practicable, in the situation in which she was before the decree was made.

In a proceeding to set aside a decree in equity, and a sale under such decree, all the parties to the decree, and the purchaser at the sale, should be made parties defendant, and brought into court; and unless this is done, the court cannot properly adjudge the decree void.

Appeal from the Des Moines District Court.

Monday, April 4.

In the year 1844, Charles H. Miller filed his bill in chancery in the district court of Des Moines county, against Robert Ralston, and Mary H. Ralston, his daughter, to subject to the payment of a judgment in his name against said Robert Ralston, lots 238 and 239, A., in Burlington, the title to which was alleged to have been procured to be made from the United States by the said Robert to his infant daughter, the said Mary H., while he, the said Robert, was largely indebted to his creditors, and among others to the said Miller. It was further alleged that the said lots were the property of the said Robert, and that at the time the title was so taken in the name of said Mary H., the said Robert was unable to pay his debts, and had no property from which the same could be made; and that the purchase money for the same was paid by the said Robert, and all the improvements upon the lot were erected by the said Robert, and paid for out of his own means.

At the October term, 1847, the cause came on to be

heard, upon the complainant's bill, and the answers of said Robert Ralston, and of said Mary H., by her guardian ad litem, James W. Grimes, and the evidence in the cause; and it was by the court decreed that the said lots be sold by the sheriff to satisfy the complainant's judgment; that the proceeds be applied for that purpose first; and that any surplus remaining should be paid over to the said James W. Grimes, as prayed for by said Grimes, and decreed by the court, upon his petition to that effect filed in said cause. It was also further decreed by the court, that the said Mary H. Ralston be allowed a year and a day after she should arrive at the age of twenty-one years, to show cause against and to set aside said decree.

The present bill was filed by the said Mary H. Ralston in February, 1856, alleging that she arrived at the age of twenty-one years on the 21st of June, 1855, and not before; and she prays that for error in the decree of the court in the suit of *Miller v. Ralston*, the same may be reversed and held for naught, and that the sale of the said lots, made by the sheriff under said decree, be set aside, and the sheriff's deed cancelled. The errors alleged are:

- 1. That the said decree was made without any legal and sufficient answer on the part of said Mary H.
- 2. That the order appointing a guardian ad litem, was made on the application of the complainant in said suit.
- 3. That the guardian appointed was interested against the said Mary II., in one of the said lots, at the time of his appointment, and at the date of the said decree.
- 4. That the court permitted evidence to be received against the said infant, by consent of her said guardian, which otherwise was inadmissible; and received and acted on admissions made by her said guardian, which could not legally be made for her, she being an infant defendant.

It is charged in said bill, that the complainant, being an infant of tender years, could not, and did not, appear in defense of said suit; that the district court, without her knowledge or concurrence, and on the application of the

said Miller, appointed a guardian ad litem for her; that said guardian, at the time of his said appointment, was then claiming to be interested in said lot number 238, adversely to his said ward, as a pretended purchaser of the same from said Robert Ralston, which said interest was not disclosed to the court, but was fraudulently suppressed; that an answer was put in by said guardian, admitting a portion of the facts charged in the bill; that the answer was not verified by the oath of the said guardian; that no replication thereto was filed; that the said guardian consented that certain affidavits should be used as evidence in the cause; that the decree rendered, after directing that the said lots be sold to satisfy the judgment of Miller, further directed that the surplus, if any, should be paid over to said guardian, on his individual claim against said Robert Ralston, as the purchaser from him of said lot number 238; and that at the said sale by the sheriff, the said guardian became the purchaser of said lots, at the price of ten dollars each, and received a deed of conveyance for the same from the sheriff.

By an amended bill of complainant, it is alleged that the purchase of the said lots by the guardian, and the conveyance of the same to him by the sheriff, were fraudulent and void as to complainant; and that the said decree and sale ought to be vacated and set aside; and it is prayed, that for such fraud, the same may, by decree of the court, be set aside, or that the present holder of said lots be decreed to convey to complainant.

The complainant makes defendants to her bill, John Lahee, who, it is alleged, is in possession of the lots, claiming to be the owner of the same by virtue of title derived from Grimes, the purchaser at sheriff's sale, and Miller and Ralston, the parties to the original suit; but the latter are not served with notice, and make no defense. Lahee answers, denying the allegations of the bill, and particularly denying all fraud, and averring that he is an innocent purchaser of said lots, in good faith, without notice, and for a valua-

ble consideration, from Jos. Greenough, who purchased of Grimes, the holder of the title under the sheriff's sale.

The court rendered a decree in favor of the complainant, adjudging the right and title of the premises to be in her, and that the title of the defendant, Lahee, as against her, was fraudulent. The title of Lahee was, therefore, vacated and set aside, and the complainant quieted in her title as against him. From this decree, the defendant has appealed.

C. Ben Darwin, for the appellant, cited McPherson on Infants, 254-261; 1 A. K. Marsh., 400; 5 Monroe, 452; 5 Blackf., 328; 7 Dana, 479; 6 Ib., 88; 8 B. Monr., 105; 12 Ib., 471; 7 Ib., 56; 3 A. K. Marsh., 254; 2 Ib., 167; 2 How., (U. S.), 341; Rev. Stat., 1843, 105; 13 Pick., 272; 2 Paige, 64, 101.

David Rorer, for the appellee.

22

This is not a bill of review, but to set aside decree and sale for fraud. It is not a continuation of the old, but is an original proceeding, to remove the cloud from complainant's title, created by a void proceeding.

I. The guardian ad litem admitted facts, and also admitted unsworn testimony in evidence, and ex parte affidavits also; and did not, by answer, controvert the truth of the bill. It was his special duty to contest every point; and however his failing to do so might not affect a stranger purchasing under the decree, it does void the purchase, when made by such guardian himself. Knickerbocker v. De Forest, 2 Paige, 304; 13 Pick., 272; 2 Paige, 64 and 101. For he that is entrusted with the interest of others, cannot be allowed to make an interest thereof to himself. Buckles v. Lafferty, 2 Rob., 292, and note to p. 301; Van Epps v. Van Epps, 9 Paige, 241; Torry v. Bank of New Orleans, 9 Ib., 663; 2 Kent's Com., Tit. Guardian and Ward, 229 and note; 1 Story's Eq., secs. 308, 309, 317, 322, 323, 337;

2 Story's Eq., sec. 1261-1265; Jackson v. Samsbaugh et al., 10 Johns., 435; Bank U. S. v. Ritchie, 8 Peters, 128; Walker v. Ferrin, 4 Vermt., 523; Rogers v. Cruger, 7 Johns., 557; Hite v. Hite, 2 Rand., 409; Henry et al. v. Taylor, 15 How., 494; 1 Am. Lead. Cases, 264; 1 Parsons Con., 115, 116; Stanley v. Branan, 7 Blackf., 193; Wright v. Miller, 1 Sand. Ch., 104; Matthewson v. Sprague et al., 1 Curtis, 457; Taylor's Heirs v. Parker, 1 Smith (Ind.), 225; James v. James, 4 Paige, 115; Walton v. Coulson, 1 McLean, 120.

II. By the papers on file, the guardian ad litem is shown to have had an interest at the time of the decree, adverse to, or in conflict with the minor. This renders the decree fraudulent in law and void, and the guardian was a witness against his ward, which, also, as against the claim of the guardian, is fraudulent and void. Payton v. Robinson, 1 Sim., 390; Payton v. Bond, 1 Sim., 390; 3 Eng. Ch., 196; Parker v. Lincoln, 12 Mass., 16.

III. But this is alleged to be simply a bill of review, and is objected to as such. If it were, it were sufficient to vacate the proceedings. *Mosier's Heirs* v. *Graham's Adm'r*, 3 McLean, 42, 43; *Ross* v. *Prentiss*, 4 Ib., 107; *Root* v. *Stone*, 2 Leigh, 650.

IV. The defendant, Lahee, cannot place himself upon the principle of protection to an innocent purchaser, if this be considered a bill of review. Clark v. Marshall, 4 Dana, 95. Nor, if a bill in the nature of an original bill for fraud, as we allege it to be. For, in either event, he, (Lahee), is a purchaser with notice, by the recitals in the deeds under which he purchases and makes title. Oliver v. Piatt, 3 How., (U. S.), 410; Hill on Trustees, (marg.), 513; Robins v. McMillen, 26 Miss., 434; Wales v. Cooper et al., 24 lb., 228; Brush v. Ware, 15 Pet., 111.

STOCKTON, J.—An infant defendant is as much bound by a decree in equity against her, as a person of full age; therefore, if there be an absolute decree against a defendant

who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it: as fraud, collusion, or error. To impeach the decree on the ground of fraud or collusion, she may proceed either by bill of review, or by original bill. To impeach it on the ground of error, she may proceed by original bill; and she is not obliged to wait for that purpose until she has arrived at the age of twenty-one. 1 Danl. Ch. Practice, 205. ordinary cases, where an infant is allowed time after her arrival at the age of twenty-one years, to show cause against a decree, the decree, in such cases, is deemed complete; but the infant has the time allowed to show cause against it. no cause is shown within the time specified, the infant is bound. McPherson on Infants, 412; 1 Danl. Ch. Practice. ch. 4, sec. 8.

After the infant comes of age, and before the decree is made absolute, she may, as a matter of course, obtain leave, on motion, to amend her answer, or to put in a new one. Stephenson v. Stephenson, 6 Paige, 353; James v. James, 4 Ib., 115. For, this permission to show cause against the decree, would be merely nugatory, if the infant were bound by the answer of the guardian. By the new answer, she may make a better defense, and support that defense by evidence; she may examine witnesses anew, and may file a bill of discovery. McPherson on Infants, 415. An infant defendant wishing to make a new defense, must apply to the court as early as possible after attaining the age of twentyone years; for, if she is guilty of any laches, her application will be refused. Mason v. Debow, 1 Hayward, 178; 1 Danl. Ch. Practice, 216.

She may either impeach the decree on the ground of fraud or collusion between the plaintiff and her guardian, or she may show error in the decree. She may also show that she had grounds of defense, which were not before the court, or were not insisted on at the hearing; or that new matter has subsequently arisen, upon which the decree may be shown to be wrong. 1 Danl. Ch. Pr., ch. 4,

sec. 8, 222. If an erroneous decree has been obtained against the infant, and the error is not in the judgment of the court, but in the facts on which the judgment is founded -as where there has been fraud or collusion between the plaintiff and the guardian ad litem—or if there has been any deception, or any surprise upon the court, the infant may, either during her infancy or afterwards, investigate the decree by a bill of review, or by original bill; and this, although her ground of complaint against it is confined to er-The proceeding on which the decree against her has been founded, is treated as fraudulent—though this expression may not, in its ordinary acceptation, be applicable to the transaction; it being considered fraudulent to take advantage of the incompetency of the infant to defend herself. McPherson on Infants, 430, 431.

The bill of complaint, in this case, is not a bill of review; but is an original bill to set aside the decree and sale of the lots in controversy, for fraud. The complainant does not ask to be allowed to put in a new answer in the suit of Miller; nor to amend the answer put in for her by her guardi-But she complains that there was error in the decree rendered, and prays that the same may be reversed; and that the sale of the lots be set aside, and the deed made by the sheriff, cancelled. By her amended bill, she charges that the defense made for her by her guardian, was fraudulent in law; that the purchase of the lots by the said Grimes, and the deed to him by the sheriff, was, as against her, fraudulent and void. And she prays that, for fraud in the defense made by the guardian, the decree and sale be set aside, and that the defendant, Lahee, the present holder of the title derived from Grimes, the purchaser at sheriff's sale, may be decreed to convey the said lots to the complainant.

The first objection urged by the complainant to the decree of the district court is, that it was made without any sufficient answer on her part, by the guardian appointed for her. It seems that two answers were put in by the guardian. In one, the guardian, averring that he knows nothing of the

Vol. VIII.-4

truth of the allegations of the complainant's bill, admits none of them to be true, and leaves the complainant to the proof. In the other answer, the guardian admits that judgment has been recovered, as alleged by said Miller, against said Robert Ralston; that execution issued thereon, had been returned, "no property found;" that said Ralston had no property out of which said judgment could be satisfied; that the said Mary H. is the daughter of said Robert Ralston; and that the title of said lot, 239, A., is in the said infant. The other allegations of the bill are denied.

An infant is not bound by admissions made in his or her behalf, unless such admissions are for the benefit of the infant; and where there is an infant defendant, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of adults, must be proved against the infant. There can be no valid decree against an infant, by default, nor on the answer of her guardian. Mills v. Dennis, 3 Johns. Ch., 367; Massie v. Donaldson, 8 Ohio, 377; Walter v. Coulson, 1 McLean, 125; Chalfant v. Monroe, 3 Dana, 35; 1 Danl. Ch. Prac., ch. 4, sec. 8; French v. French, 8 Ohio, 381.

We do not see, however, that the admissions made by the guardian, in this instance, went to prejudice the rights of the infant, the present complainant. The judgment recovered against Robert Ralston, and the return of the execution issued thereon, were part of the records of the court, and we cannot assume that the decree was made upon these admissions, or upon the other fact admitted by the guardian, that the said Mary H. was the daughter of the said Robert Ralston. The material facts alleged, on which the prayer of the complainant, Miller, was based—as that the title of the lots was by the said Robert, taken in the name of his infant daughter, Mary H., in order to prevent the same from being reached by his creditors; that the purchase money was paid by the said Robert, and not by the said Mary H.; that the improvements on said lots were made by the said Robert,

and paid for by his own means; and that the said Mary held the title in her own name, as the trustee of said Robert; these are all denied by the answer of the guardian, and were required to be proved by the said Miller, before any decree could be rendered in his favor.

The second objection urged is, that the appointment of the guardian ad litem, was made on the application of the complainant in said suit. In Knickerbocker v. Defreest, 2 Paige, 304, it is said that "the court never selects a guardian ad litem, on the nomination of the adverse party." By this, it is understood, that the court will not permit the adverse party to choose the guardian for the infant. Subject to this rule, it is held that the guardian may be appointed either on the motion of the plaintiff, or of the defendant. McPherson on Infants, 396; Williams v. Wijun, 10 Vesey, 159. There is nothing in the record to show that the adverse party selected the person appointed guardian for the infant.

The third objection urged is, that the guardian appointed was interested against the infant, his ward, in one of the said lots, at the time of his appointment, and at the date of the decree. This fact might have afforded a sufficient reason for removing the guardian, and for the appointment of some other person. But unless it is shown that the guardian appointed, made use of his position as such, to work some injury to the interest of the infant, the mere fact that he was interested in the title of one of the lots, is not such conclusive evidence of fraud, as to authorize the setting aside the decree for that reason alone.

The fourth objection is based upon the reception of evidence by the court, by permission of the guardian, which was otherwise inadmissible; and upon the fact that the court received and acted upon admissions made by the guardian, which he had no right to make, and by which the infant was not bound. This objection refers more particularly to the affidavits of certain persons, made and filed in the cause, and used by consent of parties, instead of the testimony

being taken upon interrogatories, in the usual form of depositions. Infants are as much bound by the conduct of those who conduct their case, as adults, provided their conduct be bona fide. And it has been held that although the rule is, that the evidence must be taken upon interrogatories, and not upon affidavits; yet, if the solicitor for the infant assents to, and acquiesces in, the mode of proceeding, the infant will be thereby bound. Tillotson v. Hargrave, 3 Mad., 494; 1 Danl. Ch. Pr., 205.

The objections urged by the complainant, may have been altogether pertinent on an application by her to open the decree, and allow her to file an amended answer, and contest anew the right of Miller to the relief granted him. Such, however, is not the object of the present bill. insisted by the counsel, that this is not a bill of review, but an original bill to set aside the decree and sale, for fraud; that it is not a continuation of the old, but is a new proceeding, on an original bill, to remove the cloud upon complainant's title, created by the former proceedings. does not seek to try over again the chancery suit of Miller v. Ralston, upon a new or amended answer, nor upon new or additional testimony. Her purpose is to reach the property in the hands of Lahee, the present holder by intermediate conveyances, of the title derived under the sheriff's sale by virtue of the decree. We think no such fraud or collusion has been shown, as to authorize the court to vacate the former decree for that reason, and declare the title of the property vested in the complainant. As she was allowed time after coming of age, to show cause against the decree, she was, as a matter of course, entitled, at any time before the decree was made absolute, to put in a new answer, and have the cause heard again. Fountain v. Cains & Jeffs, 1 Perre Williams, 504. The consequence of such putting in of a new answer is, that if it is replied to, she may examine witnesses anew to prove her defense, which may be different from what it was on the first trial. Napier v. Effingham, 2 Perre Williams, 401.

The consequence of a reversal of the first decree, or of a decree on a rehearing of the former suit, against the complainant, Miller, and its effects upon the title of the property in the hands of Lahee, claiming to be an innocent purchaser for a valuable consideration, without notice, need not now be determined. Where a decree has been rendered against an infant, and she afterwards succeeds in showing that it ought not to have been made, the court will place her, as far as is conveniently practicable, in the situation in which she was before the decree was made. Pope v. Lemaster, 5 Littell, 76; Prutzman v. Pitesell, 3 Harr. & J., 77, 82. Whether the title of the present respondent can be affected, may be the subject of future consideration.

We notice another defect in the proceedings, which we think constitutes a valid objection to the decree rendered. Neither Miller nor Ralston, parties to the original suit, are brought into court by service of process, nor is Grimes, the purchaser at the sheriff's sale, even made a party. The court could not adjudge the original decree void, without bringing into court, in some manner, all the parties to it; and as the interests of Grimes, the purchaser at the sheriff's sale under the decree, were to be affected by the proceedings, it was requisite that he also should have been made a party.

Decree reversed.

Armstrong v. Pierson.

It is not true, as a general proposition, that in slander, the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages.

Where in an action of slander, the court, after stating the different kinds of damages, instructed the jury as follows: "That compensatory damages are given, where the words were spoken without malice, but under circumstances which show a want of caution, and a proper respect for the rights of the plaintiff. Compensatory damages are such as will pay the plaintiff for his expenses and trouble in carrying on the suit, and disproving the slanderous words;" and where the court afterwards in-

structed the jury, "that the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages;" *Held*, That the latter instruction, taken in connection with the definition of compensatory damages, given by the court, was not erroneous.

A party cannot complain of an instruction which, even if erroneous, worked him no prejudice.

Appeal from the Des Moines District Court.

MONDAY, APRIL 4.

SLANDER. The speaking of the words is denied; and, among other things, it is set up in the answer that plaintiff's character was not injured by the alleged speaking. Evidence was introduced tending to show that plaintiff was a man of bad general character. The court instructed the jury, "that the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages, which are always given as a punishment on the defendant." Judgment for plaintiff, and defendant appeals, assigning the giving of this instruction for error.

Starr & Phelps and Robertson, and M. D. Browning, for the appellant.

C. Ben Darwin, for the appellee.

Weight, C. J.—The objection made is not to the concluding part of the instruction; or the words, "which are always given as a punishment on the defendant." The argument is directed, alone, to the proposition that plaintiff's character was not to be taken into the account by the jury, until they come to consider whether he was entitled to vindictive or exemplary damages. In other words, it is said that the jury were told that plaintiff might be entitled to nominal and compensatory damages; and that, in giving compensation, good or bad character was to have no weight. As a general proposition, we are of the opinion, that the rule laid down by the court below, is incorrect. If by compensa-

tion is meant recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant—if the object in giving such damages is to compensate the plaintiff for his loss, and to make him whole as he was before the infliction of the injury—then it would seem to be plain, that if his character was bad, he would have less to lose, and less compensation would suffice to make him whole, than if he had a good and untarnished character. 2 Greenl. Ev., secs. 253, 424; Stone v. Varney, 7 Met., 86; 2 Stark. Ev., 369; Wolcott v. Hale, 6 Mass., 514.

This instruction, however, must be examined in connection with the others; for, as we have frequently had occasion to remark, the correctness or incorrectness of a particular instruction, depends almost entirely upon the circumstances of each case; and that, therefore, what would be law under one state of facts, would be error, because inapplicable, under another. And thus examined, it was not erroneous; or, if so, it works no prejudice to defendant. The jury were told that there were three kinds of damages: 1. Nominal. Compensatory; and 3. Aggravated, or vindicatory. circumstances under which nominal damages would be proper, are stated; and it is then said, that "compensatory damages are given where the words were spoken without malice, but under circumstances which show a want of caution, and a proper respect for the rights of the plaintiff. Compensatory damages are such as will pay the plaintiff for his expense and trouble in carrying on the suit, and disproving the words." The jury had been before told that they must find that the words were spoken as charged—that if they so found, they were actionable per se; and the instructions now under examination, with others, were given to guide them in estimating the damages.

Now, the bad character of plaintiff is no bar to his right to recover; it only goes in, what is termed, mitigation of damages. The law, as well as sound morality, dictates that the plaintiff, whose character is bad, corrupt, and bankrupt, should recover less than he who is pure and spotless. If any

man, however, is charged with the commission of a particular offense, the law gives him the right, whatever his character, to appeal to the tribunals of the country for compensation, and, (in the language of the court below), "to disprove the words charged." If the words are true, and justification is pleaded, he may recover nothing. If bad character is relied upon, and the words were false, and spoken without any just or rightful occasion, then character, however bad, will not defeat the action entirely, but may lessen the amount of recovery. The trouble and expense of carrying on an action, and to disprove the truth of the words, are the same to the man of bad character, as to the one of good name and fame; and if compensatory damages means, alone, recompense for this trouble and expense, then the jury would have nothing to do with character, in estimating such dama-No one has a right, with impunity, to falsely, and with a bad motive, charge the worst character with the commission of a specific offense. If he does so, he should be held, at least, to recompense the party so falsely charged, to the extent of his trouble and expense, in removing or disproving the unjust accusation. And this, as defined by the court below, is what is meant by compensatory damages. Upon this definition, the jury are presumed to have acted. understood, there was no error in the instruction.

We have suggested, also, that the instruction, if erroneous, worked no prejudice to defendant, and he cannot therefore complain. This, we demonstrate thus: The instruction in effect informs the jury, that they would consider the good or bad character of plaintiff, if they concluded to give him more than compensatory damages. The verdict was \$2,800, an amount so large as to show that they did award more than what were styled compensatory damages. Under such circumstances, they were informed to take into consideration the character of plaintiff. We are bound to presume that they did their duty in this respect, and found, notwithstanding the testimony in relation to his character, that plaintiff was still entitled to the amount returned.

Judgment affirmed.

LUMMERY v. BRADDY.

Where one of the questions at issue in a cause in equity, involves the character of proceedings in an action at law and the questions therein at issue and decided, and the transcript of the proceedings in the action at law, is not made a part of the record, the appellate court can only ascertain what matters were put in issue and decided in the former suit, from the allegations of the pleadings in the chancery suit, not responded to, or expressly admitted by the other party.

Where in a proceeding in equity, to restrain the respondents from flowing back the waters of the Nodaway river, by their mill dam, upon the land and mill site of the complainant, on the ground that certain proceedings under a writ of ad quod damnum, and the license granted to the respondents to build their dam, did not preclude the right of complainant to damages resulting to her from the acts of respondents, nor her right now to claim an injunction against them, to restrain them from flowing back the water of the river upon her mill-site, because she was no party to said proceedings, it appeared that one of the complainants, and the husband of the other, was made a party to the proceedings under the writ of ad quad damnum, and had due notice thereof; that upon the return of the inquisition, he was duly sumoned to show cause why the said license should not be granted; that no objection being made, a license was granted to respondents to build their dam eight and a half feet high; that the land was in the possession of the husband at the time of the proceedings under the writ of ad quod damnum, claiming to hold it by right of pre-emption; that it was entered with his money and the title taken in the name of the wife, without her knowledge, during the progress of the said proceedings; and that it remained in the possession of the husband, after its purchase in the name of the wife; Held, That the complainants were bound by the proceedings under the writ of ad quod damnum, and the judgment of the district court rendered thereon, granting license to respondents to erect their mill dam.

Where under a bill to restrain the respondents from flowing water upon the lands of the complainant, by their mill dam, the district court ordered the respondents to remove their dam, and directed that in case the same is not removed within thirty days, the sheriff remove the same; *Held*, That as there was no prayer in complainant's bill to that effect, the court erred in ordering a removal of the dam.

Where a license is granted for the erection of a mill dam, under a writ of ad quod damnum, the proceedings amount to a condemnation of so much of the land, and of the right of the owner thereto, as may be affected by the flowing back of the water, when the dam is raised to the height prescribed.

A judgment for damages caused by the flowing of lands by a mill dam, Vol. VIII.—5

which were not foreseen and estimated by the jury of inquest under a writ of ad quod damnum, afford no ground for an injunction againt the owner of the mill dam, nor does it affect his rights under his license.

Appeal from the Page District Court.

MONDAY, APRIL 4.

In Chancery, for an injunction to restrain defendants from flowing back the waters of the Nodaway river, by their mill-dam, upon the land and mill-site of complainants. On the hearing, a perpetual injunction was granted as prayed for. Defendants appeal. The material facts appear in the opinion of the court.

John A. Kasson, and D. O. Finch, for the appellants.

Cole & Jewett, for the appellees.

Stockton, J.—The complainants base their right to the injunction, claimed by them against the defendants, upon the fact that Almira Lummery, since the first day of January, 1856, has been the owner of the land on which their mill-site is located; and the further fact, that at the September term, 1856, of the district court of Taylor county, they recovered a judgment against the defendants, in an action at law, in right of said Almira, for the damages sustained from the flowing back of the waters of the Nodaway river upon them by the defendant's dam. The defendants answer, that the judgment recovered against them by complainants, was for obstructing and delaying complainant's work, and destroying their mill-site by back water upon their dam.

It will be seen that an important question to be determined is the character of the proceedings in the suit at law, and the questions therein at issue and decided. The record in this case, shows no transcript of the proceedings in the suit at law between the parties, in the district court of Taylor county. This transcript is referred to by complainants, in their replication to defendant's answer, as "Exhibit B," accompanying

complainant's bill, and made part thereof, and as furnishing evidence of the questions put in issue by the parties, and decided in complainant's favor in said suit at law. No transcript of said proceeding, however, accompanies their bill of complaint. The complainants, suggesting a diminution of the record at the June term of this court, 1858, obtained a writ of certiorari to the clerk of the district court of Page county, to perfect the record in this suit, by sending up such transcript. The clerk, in response to said writ, certifies to this court that the records in his office do not show that any transcript of the proceeding in the sait at law between the parties, was ever filed in said cause; and that the same was never filed, as shown by the records in his office.

In the absence of any record of these proceeding in the action at law, we can ascertain what matters were put in issue and decided therein, only from the allegations of the pleadings not responded to, or expressly admitted by the other party.

It is claimed that the proceedings under the writ of ad quod damnum, and the license granted to the defendants to build their dam, did not preclude the right of said Almira to damages for the injuries resulting to her from the acts of defendants, nor her right now to claim an injunction against them, to restrain them from flowing back the water of the river upon their mill site, because she was no party to the said proceedings, and is not bound by them.

The record shows that in August, 1855, the defendants commenced proceedings under the statute, in the district court of Page county, to obtain a license to build a dam across the Nodaway river, and to have assessed by a jury, the damages of the owners of the lands to be affected by the same. To these proceedings, Andrew Lummery was made a party, and had due notice of the same; and upon the return of the inquisition, was duly summoned to show cause why the said license should not be granted. No objection being made, a license was granted to defendants to build their dam eight and a half feet high. This license, defendants claim, gave them the right to flow back the

water of said river upon the lands of all persons made defendants in said proceeding.

Without the record in the suit at law before us, it is impossible for this court to determine the nature and character of the issues made therein by the parties. The injunction was granted by the district court, on the assumption that the rights of the complainants had been settled and determined in the suit at law. So, the court suppressed all the depositions taken by defendants, and refused to permit them to be read in evidence, on the ground that the matters concerning which the witnesses depose, had all been pleaded and adjudicated in the said suit.

As there was no prayer in complainant's bill to that effect, we think the district court went too far, in ordering defendants to remove their dam, and directing that in case the same was not removed in thirty days, the sheriff remove the same. All that complainants asked, was an injunction to restrain defendants from flowing back the waters of the Nodaway upon their property, and this was all the court was required to grant, even admitting that the facts alleged by the complainants, were all proved to the satisfaction of the court.

But we have not been able to arrive at the same conclusion as the district court, as to complainant's right to relief. The evidence before us does not satisfy us that the rights of the parties have been settled and determined, in any such sense, in the suit at law, as that a court of chancery should, upon the verdict and judgment alone, grant a perpetual injunction, as prayed in the petition, and granted by the court. The cause is before us for trial on appeal, in the same manner as if there had been no trial in the district court. And we are to declare, from the record before us, whether there is sufficient ground for awarding the the relief prayed.

We think the district court erred in excluding the depositions taken by defendants. These depositions show, that although the land on which the complainants claim to have a mill-site, was purchased of the United States, in the name of

Almira Lummery; yet it was paid for with money furnished by Andrew Lummery, who, for his own reasons, had it entered in the name of his wife, without her knowledge; that although it was so purchased in the wife's name, it had, in fact, been in possession of the husband long before; that he had applied at the government land office to enter the same by pre-emption; and that he had filed his claim so to pre-empt the same, and when the time, within which the pre-emption was required to be proved up, was about to elapse, because he could not prove up his pre-emption and purchase the land in his own name, fearful that it might be entered by some other person, directed the messenger, by whom he sent the money to the land office, to take the certificate of purchase in his wife's name. There is some attempt to show that the husband was indebted to the wife, or had used some of her money, and that by the purchase of this land in her name, he intended to repay her; but the thin veil with which he has contrived to cover his acts, has not served to conceal the real motive and design involved in them.

The purchase of the land in the name of the wife, was made during the progress of the proceedings instituted by the defendants, to obtain a license from the district court for the erection of their dam. Andrew Lummery was a party, and notified of these proceedings. He was, at the time, the ostensible owner of the land, being in possession of it, and claiming it by right of pre-emption. Whether the taking the title of the land in the name of his wife was, or was not, with the purpose of avoiding the effect of the proceedings on the writ of ad quod damnum, we think, that to give to it such operation, would be to encourage fraud and injustice. think the complainants are, both of them, bound by the inquest of the jury, and by the judgment of the district court thereupon, granting license to defendants to erect their mill dam.

It is not made to appear in the record, what damages were awarded to the complainant, Andrew Lummery, to be paid by the defendants, for the right and privilege of flowing the

waters of the river back upon their land That they acquired the right so to do, we can entertain no doubt—the proceedings under the writ of ad quod damnum, amounting to a condemnation of so much of complainant's land, and of their right thereto, as should be affected by the flowing back of water from defendant's dam, when raised to the prescribed height of eight and a half feet. The evidence shows that the dam was not higher than eight and a half feet.

The complainants do not pretend, or claim, that they had erected a mill, or a mill dam, on their land. They allege that they had a mill-site. They had taken no steps to obtain from the district court a license to build a mill dam. And their right to obtain such license may well be questioned, when it is considered that the license to the defendants, gave them the right to flow the water of the river, not only upon complainant's land, but over the lands of other proprietors lying upon the river, and above that of complainants. Any right, therefore, that complainants could have derived from a license, if granted, must have been entirely subservient to those of defendants, which were prior in point of time.

If the proceedings on the writ of ad quod damnum conferred any right at all on defendants, it amounted to a license to them to flow the water of the river from their dam over the very point where the complainants claim to have a mill-site. The complainants have not only shown no mill dam, but they show no right to erect one. In this respect, the equity of defendants is not only older in respect to time, but better in point of right.

We suppose it is fairly to be gathered from the record, that there was a suit at law between the parties, about the flowing back of the waters of the river from defendant's dam upon the lands of complainants. This suit was in right of Almira Lummery, the holder of the legal title to the land. The defendants admit by their answer, that the suit was bought for two thousand dollars damages, for obstructing and delaying complainant's work, and destroying their mill-site by backwater, but allege that complainants claimed no other relief,

and that the damages awarded were in full satisfaction of the injury sustained; and that they were duly licensed and empowered to build their dam eight and a half feet high, and to flow back the water upon complainant's land. The complainants reply, that all questions as to the title of Almira Lummery to the land, and as to whether defendants had a license so to erect their dam eight and a half feet high, and flow back the water of said river upon complainant's, were put in issue and adjudicated in said suit at law; and that the damages accruing to complainants, were not foreseen and estimated by the jury, upon the inquest under said writ of ad quod damnum.

It is not shown in the record, what damages were awarded to complainants in said action; nor, in the absence of the record in the suit at law, can we undertake to determine definitely, what questions were adjudicated and settled by it. It is certain, however, that an action may have been brought, as alleged by complainants, and as admitted by defendants, and still no question put in issue or decided at all affecting defendants' rights under their license, and without settling any issue or matter upon which complainants can found their right to an injunction against defendants, or any claim to demolish their dam.

The statute authorizing the condemnation of land for mill sites, and the assessment of the damages of the proprietors of the land to be affected by the erection of the mill dam, under the writ of ad quod damnum, expressly provides that no inquest of a jury, nor any judgment thereon, shall bar any action which might have been maintained, if said act had not been passed, unless the prosecution, or action, was actually foreseen and the damages estimated upon the inquest. Sec. 8 of Act of Jan. 24, 1853.

The damages awarded to complainants may, as alleged by them, not have been foreseen and estimated by the jury on the inquest. In such event, the judgment for damages, is no ground for an injunction against the owners of the mill dam; it does not affect their rights under their license;

but is to be considered rather as compensation for injuries not foreseen or estimated by the jury upon the inquest, as permitted by the statute, to be recovered in such action at law; and, in this view, may be rather considered as a confirmation of the license granted to defendants.

The judgment and decree of the district court will be reversed, the injunction dissolved, and the complainants' bill dismissed.

89 447 8 40 98 156 8 40 109 686

Tomlinson v. Hammond et al.

The term "civil actions" in sec. 2098 of the Code, includes everything except those cases which come under the criminal jurisdiction of the courts.

Under section 2098 of the Code, matters cognizable alone in a court of equity may be submitted to arbitrators.

A party cannot complain of an award of arbitrators, which, though it may be wanting in certainty or definiteness, was designed, and was in fact, for his benefit and protection.

Where it is sought to set aside an award of arbitrators, on the ground of their misconduct, the fact of such improper conduct must be made fully apparent to the court.

An award need not not show affirmatively, that the witnesses before the arbitrators, were sworn. It will be presumed that the arbitrators discharged their duty in respect to swearing the witnesses.

Where an award is recommitted to the arbitrators, for reconsideration, it is not necessary that the arbitrators should be resworn; nor need the award, after such reconsideration, show upon its face, that the arbitrators were sworn in the first instance.

Where one of two partners sold out to the other—the purchaser taking all the assets of the firm, and assuming the payment of all the liabilities; and where in proceedings between the two partners, under a submission to arbitrators, the arbitrators found that in the keeping of the books of the firm, there had been mistakes, and that the vendor had recieved credits and cash with which he was not charged, amounting to the sum of \$1,900—among which was the following item: "For credits entered, which he is not entitled to, \$1,431.84"—which sum was awarded to the vendee of the partnership interest; and where it was claimed that the vendee was entitled to recover for only one-half of the said sum of \$1,431.84;" Held, That the vendee having purchased the interest of

his partner, he was substituted to all the rights of the partnership, and whatever either was owing to the firm, belonged to him.

Every presumption is in favor of the correctness of an award of arbitrators.

Appeal from the Cedar District Court.

MONDAY, APRIL 4.

THE PLAINTIFF and the defendant, Hammond, were partners, under the name and the style of Hammond & Tom-The defendant, Twitch, purchased the interest of Hammond, and the business was afterwards conducted in the name of Tomlinson & Co. Twitch bought out Tomlinson, taking all the assets, and undertaking to pay all the debts of both firms. Some misunderstanding and difficulty after this arose between the parties, each charging the other with a failure to comply with his contract—the result of which was, that Tomlinson sued Twitch, and Twitch & Hammond, in separate actions, and Twitch brought his action against Tomlinson. The parties referred all matters embraced in their actions, to arbitrators, as well as everything of an unsettled nature between them, both of law and equi-The arbitrators submitted their award, to which certain exceptions were taken by plaintiff. These were overruled, the award adopted, and judgment entered in accordance with its terms. Plaintiff appeals. For the other material facts, see the opinion.

Cook, Dillon & Lindley, for the appellant.

Bissell & Spicer and Richman & Bro., for the appellees.

WRIGHT, C. J.—The parties have submitted this case upon a very incomplete and confused record. The consequence is, that we have had great difficulty in apprehending many of the points made and positions assumed by counsel. And now, after the most careful examination, we are not fully satisfied that the conclusions to which we have arrived, are in all respects correct.

Vol. VIII.—6

It is not our purpose to state at length the facts connected with this protracted litigation. We shall, as briefly as possible, submit our views upon the questions of law made, referring to the facts only so far as may be necessary.

Precisely what was claimed by the parties in the three actions referred to the arbitrators, does not appear. We infer, however, that one action, at least, was on the equity side of the court. And based upon this assumption, the appellant insists that matters cognizable alone in a court of chancery, could not be submitted to arbitrators. The Code provides that all controversies which might be the subject of civil actions, may be submitted to the decision of one or more arbitrators. Section 2098. We are very clear that this includes controversies cognizable in a court of equity, as well as those triable in a court of law. "Civil actions," as here used, include everything, except those cases which come under the criminal jurisdiction of our courts. Code, sections 1576, 1676-7; 2 Greenl. Ev., sec. 78.

The arbitrators found in favor of Twitch, and against Tomlinson, in about the sum of \$2000, and awarded that Tomlinson might, at any time within three months, pay that amount, or so much as should be necessary, to the creditors of the late firms—being the debts which Twitch was to pay by the terms of the dissolution; that receipts from such creditors should be good as payments upon the sum so found; and that in the event that he failed to pay the whole amount so found due Twitch, within said three months, judgment should then be entered against him for the balance. It is objected that the award in this respect is not certain, specific, nor final, but that its force depends wholly upon certain contingencies; and that no judgment could be entered upon it, as upon the verdict of a jury.

If the award in this respect, is wanting in certainty or definiteness, it is a defect of which the appellant cannot complain. Assuming that the arbitrators found correct as to the amount, then Twitch was entitled to a judgment, at once, for that sum, and the permission given to Tomlinson, to pay

the money within three months to the creditors, instead of to Twitch, was designed, and was, in fact, for his benefit and protection. But for this condition, he might have been compelled to pay the \$2000, and to rely upon the ability of Twitch to pay the firm debts, for which debts to the creditors, they were equally bound. And the propriety of this order, so far as protection to Tomlinson is concerned, is abundantly shown from the fact that some of the creditors had already sued and attached the property of Tomlinson, and this was one of the matters of which he complained in the action brought against Twitch.

Appellant further claims, that the arbitrators were guilty of gross misconduct, in permitting Hammond and Twitch to testify, when not called upon by Tomlinson; and in render ing their award upon the hearsay of one of their own number. To these objections, it is sufficient to say, that they are not sustained by the facts. Taking all the affidavits returned, with the submission and award, into consideration, there is nothing to sustain the charge of misconduct.

It is claimed, also, that the return does not show that the arbitrators were sworn, nor that the witnesses who testified before them, were examined under oath. It is clearly unnecessary for the award to show affirmatively that the witnesses were sworn. The presumption is, that the arbitrators discharged their duty in this respect.

The first part of the objection is untenable, for the following, if for no other, reason: It seems that the arbitrators once before made their award, which, on motion of plaintiff, was re-committed. What was contained in that award, or returned with it, we do not know, for no part of it is before us. The one now before us states, that the first was "referred back to the undersigned, (the arbitrators), for re-consideration and re-examination." Upon such re-commitment, it was not necessary that the arbitrators should be again sworn, any more than to swear a jury a second time, when sent to their room, after reporting their inability to agree, or returning an informal verdict. Nor need the award, after such reconsideration, show upon its face that they were sworn in the

first instance. We are not to be understood as holding, that this fact should appear affirmatively in any case. It is only determined that the return made after the re-submission, need not show it. There is no showing by affidavit, or otherwise, that they were not sworn. The question stands upon the single ground that it does not appear affirmatively from the return. Depen v. Davis, 2 G. Greene, 260; McKinney v. Western Staye Co., 4 Iowa, 420; Thompson v. Blanchard, 2 Ib., 44.

It will be borne in mind, that Twitch bought out Tomlinson, taking all the assets, and was to pay all the debts. arbitrators found that in the keeping of the books of the firm, there had been mistakes; and that Tomlinson had received credits, and also cash with which he was not charged, amounting in all to about nineteen hundred dollars. this sum, one item is set down thus: "For credits entered. which he is not entitled to, \$1,431,84." Appellant now claims that but one-half of this sum should have been found against Tomlinson, and the same is claimed as to the cash received, and not charged at the time of the purchase by And the argument is, that Tomlinson was owing these sums, if at all, to the firm, and as a member of the firm, was himself entitled to one-half of them. This argument, however, looses sight of the fact that Twitch had bought out the firm, and as such purchaser, he was entitled to all of the assets. What were the terms of the dissolution and purchase by Twitch, we do not know, for they do not appear further We know nothing except that the than as above stated. purchaser took all the assets, and was to pay the debts. Whether the debts owing the firm, were from one of the members, or a third person, he was to have them all. he purchased the interest of his partner, he was substituted to all the rights of the partnership, and whatever either was owing to said firm, belonged to him.

The same objection is made to so much of the award, as finds in favor of Hammond, to the amount of near one hundred dollars. This portion of the award is as follows: "And

the said arbitrators further find and award, that said Tomlinson is indebted to, and shall pay to, William H. Hammond, the amount heretofore found and submitted, to-wit: the sum of one hundred and five dollars." What this was for, nowhere appears, except that the agreement of submission recites that "Hammond claimed that he was entitled to divers and large credits upon the books of the firm of Hammond & Tomlinson, and that Tomlinson, as book-keeper and treasurer of the firm, had made numerous mistakes in keeping the books, in his own favor, and had received large sums of money which he had not accounted for." How the arbitrators arrived at the conclusion, that Hammond was entitled to the sum stated, we cannot tell. Every presumption is in favor of the correctness of their determination. aught that appears, they pursued the very course, and adopted the method of calculation, contended for by appellant.

Other objections are made to the award. They may be disposed of, however, by the remark that they are either settled against appellant, by the views above expressed upon other points, or they were not made in the district court, and are not of a nature to be urged here for the first time. Depew v. Davis, supra.

Judgment affirmed.

CHURCHILL et al. v. FULLIAM.

Where a bond for an attachment, is signed by the principal and sureties, in their partnership name, it is sufficient.

In attachment, the penalty of the bond should be double the amount of the value of the property which the sheriff may attach, and not double the amout of the claim sworn to be due.

Where in a suit commenced by attachment, the amount of the claim sworn to, was \$1,012.69, and the bond was in the penal sum of \$2,025.38; Held. That the bond was insufficient.

In attachment, the defendant cannot, in the principal action, take issue upon the facts alleged as the basis for the attachment.

Where a plaintiff, in commencing his action, brings himself within the provisions of section 1852, which provides for commencing suit by attachment previous to the debt becoming due, in certain cases, the defendant cannot set up the defense that the debt was not due at the commencement of the action.

Whenever the law provides for the admission of books of account in evidence, it is based upon the idea of the presence of the books themselves upon the trial; and in their absence, evidence of their contents cannot be substituted.

The book iself, when admitted, becomes the witness, and is still subject to any objections which may be made by the opposite party, respecting its credibility, arising from the manner in which it is kept—its appearance, alterations, erasures, confusion and irregularity—and whatever may tend to diminish its credibility in the eyes of a jury.

Where in an action on an account, the plaintiffs proved the accounts, by proving the character and contents of their books of accounts, by the depositions of witnesses, who were their clerks, and without producing in court the books themselves; and where the court afterward charged the jury as follows: "Books of account are competent evidence of dealings between the parties, if it is shown that such books have all the marks of fairness and correctness required by law; and if the party seeking to use such evidence, is doing business, or residing, out of the state, or in a foreign country, it is competent for such party to take the depositions of competent witnesses, as to the contents of such books, after having laid the foundation as prescribed in section 2406 of the Code, and such testimony is original, and not secondary evidence;" Held, That the whole proceeding was erroneous, and not within the meaning and intent of the law relating to the admission of books of entry in evidence.

A party is not called upon to dispute an account, on every occasion on which it may be presented; and when evidence of any act or declaration of a party is given, as tending to prove the account, care should be exercised in determining whether the circumstances required the defendant to dispute the account, so as to cause his omission to do so, to have weight against him.

Where in an action on an account, the court instructed the jury as follows: "That any act or declaration of the defendant, as a payment made, or claimed to have been made, without disputing, at the time, the correctness of the account, is a circumstance which may be considered by the jury, as proof of, or tending to prove, the correctness of the account:" Held, That the instruction was too broad and unqualified.

Appeal from the Muscatine District Court.

Monday, April 4.

The action is upon an open account for goods, wares and merchandise, sold and delivered, and was commenced by attachment. The material facts and errors assigned, appear from the opinion of the court.

W. F. Brannan and Cloud & Vanhorne for the appellant.

Richman & Brother, for the appellees.

Woodward, J.—The error first assigned relates to the overruling defendant's motion to dismiss the attachment. The attachment was sued out under the provisions of section 1852 of the Code, which provides that it may issue previous to the debt becoming due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states that the defendant is about to dispose of his property with intent to defraud his creditors.

The motion to dissolve the attachment, assigns several reasons therefor. That relating to the bond being signed in the name of a partnership, in the case of both principal and surety, is disposed of by the case of *Danforth*, *Davis & Co.* v. Carter & May, 1 Iowa, 546.

The fourth ground is, that the penalty of the bond is not in the amount required by law. The statute, (section 1849), directs that the petition shall state as nearly as may be, the amount which is due. By section 1850 this sum is made a guide to the officer, who is to attach an amount fifty per cent. greater than that so stated. And then section 1853 declares that before any property can be attached, the plaintiff must file a bond in a penalty double the value of the property sought to be attached. The sum

sworn to in the present case is \$1,012 69, and the bond is in the penal sum double that amount, namely, \$2,025,38.

The defendant contends, that the bond need not be in double the highest amount which the sheriff may attach, but that it is sufficient, if it be double the amount which the plaintiff seeks to, or does, in fact, attach. some force of reason to urge in favor of this view; but it is controlled by the considerations, that the law seems to indicate a fixed criterion, in double the amount sworn to, with the fifty per cent. thereon; that there is no provision for the plaintiff naming any other amount for attachment; and that it is the clerk who approves the bond, and not the sheriff, who should do it, if the amount actually attached To these we may add further, the view were the criterion. commonly entertained, that the bond must be filed before the writ issues, which, if correct, precludes the idea of the subsequent attachment controlling it.

The conclusion seems unavoidable, that the penalty of the bond is required to be in double the amount which the sheriff may attach, since it cannot be determined before hand what amount he will take; and the amount which he may levy upon, is that sworn to be due, with fifty per cent. thereof added. And the statute is peremptory, too. "Before any property can be attached as aforesaid, the plaintiff must file" such bond. This is not a point upon which the court has any discretion. What our views of the law may be, is immaterial. We may believe the defendant perfectly secured with a bond in double the amount sworn to be due, yet this is not for us to say-the defendant is entitled to his bond. Upon this motion being made, the law permits the plaintiff to perfect his bond, but if this is not done, there is no course left for a court to take, but to hold it insufficient. The district court should have so ruled.

The second error assigned, is to the sustaining plaintiff's demurrer to defendant's answer. The answer, among other things, denied the truth of the facts alleged with a view to obtaining the attachment, as required by the statute; and

also alleged that the cause of action had not accrued when the suit was commenced. It has been determined that the defendant cannot, in the principal action, take issue upon the facts alleged, as the basis for an attachment. Hunt v. Collins, 4 Iowa, 56; Sackett, Belcher & Co. v. Partridge & Cook, 4 Ib., 416.

The other part of the answer here demurred to, is the particular subject of section 1852 of the Code, which provides for suing previous to the debt becoming due, in certain cases. It is under this section that the plaintiffs have sued, and having brought themselves within it, the defendant cannot set up the defense that his debt is not due. Much of the defendant's argument is based upon the assumption that the plaintiff is entitled to judgment before the cause of action may accrue, but this is probably an erroneous assumption. But we are not called upon to determine this finally, because, in the present case, the right of action matured soon after the institution of the suit, and before the trial, so that the court had authority to render indoment when that was done. There was no error in sustaining the plaintiff's demurrer to this portion of defendant's answer.

The third and fourth errors assigned, are to instructions asked by the plaintiffs, and given by the court. tiffs proved their account by their books, without producing the books themselves on the trial, but proving their character and contents by the depositions of witnesses, who were their clerks. None of these witnesses—the clerks, whose depositions are contained in the transcript—testify to the sale of the goods; but they testify to those "circumstances" relating to the books, which are required by section 2406 of the Code, as preliminary to their admission. Under this state of the case, the plaintiffs asked, and the court gave, the following instruction: Books of account are competent evidence of dealings between parties, if it is shown that such books have all the marks of fairness and correctness required by law; and if the party seeking to use such Vol. VIII.-7

evidence, is doing business, or residing out of this state, or in a foreign country, it is competent for such party to take the depositions of competent witnesses as to the contents of such books, after first having laid the foundation as prescribed in section 2406 of the Code, and such testimony is original, and not secondary evidence.

This proceeding was erroneous, and was not in accordance with the meaning and intent of the law relating to the admission of books of entry. The admission of these books as evidence, is of such a character, that it may be said to have hardly won its way to a place among the rules of law. Wherever admitted, it is based upon the idea of the presence of the books themselves upon the trial; and we have never known an atttempt to dispense with that presence, and substitute evidence of their contents. certain preliminary testimony concerning them, the court is to determine on their admissibility; but in the mode of proceeding adopted in this case, the party offering them assumes this adjudication. Then, the books being admitted, they are still subject to any objections which may be made by the other side, respecting their credibility, arising from the manner in which they are kept-their appearance-alterations, erasures, confusion, and irregularity-and whatever might tend to diminish their credibility in the eyes of a jury. This is in the nature of the cross-examination of a witness, and this is taken away—the other party has no opportunity to object.

Again: The book itself becomes the witness, when admitted: and its testimony cannot come by hearsay through other witnesses, nor can its deposition be taken. Another view in which this proceeding may be presented, is that it is permitting a party to give secondary evidence of the contents of a paper, or of a writing, which is in his own exclusive possession. The allowance of this practice would violate every principle upon which the admission of books of entry is supported. The whole doctrine is based upon the idea of the presence of the books upon the trial. We are

clearly of the opinion that the court erred in this instruction, and in admitting this testimony as a substitute for the books themselves.

The defendant also excepted to the following instruction: "Any act or declaration of the defendant, as a payment made, or claimed to have been made, without disputing at the time the correctness of the account, is a circumstance which may be considered by the jury, as proof of, or tending to prove, the correctness of such account." The instruction, taken as a proposition, is entirely too broad and unqualified, and is in part obscure and uncertain; but, if viewed in reference to the testimony in the particular case, and limited to this, should not alone reverse the judgment. But even as applied to the single case, it should be with caution. The defendant is not called upon to dispute the account on every occasion, and care should be exercised in determining whether the circumstances called for it, so as to cause his omission to have weight against him.

For the ruling of the court upon the motion to dissolve the attachment, and for the instruction concerning the admission of the testimony in relation to the books of account, the judgment of the district court will be reversed, and the cause will be remanded for further proceedings, not inconsistent with this opinion.

DESCRILES v. KADMUS.

Where a husband introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, the wife will be justified in withdrawing from his protection, and he will be bound to provide her with necessaries.

The husband is required to supply the wife with necessaries, such as meat, drink, clothes, medicine, &c., suitable to his degree and circumstances; and if he, by his treatment, shall render her situation unsafe, or their home unfit for a modest and chaste woman to remain in, he sends her from home as effectually as if he turned her out of doors without cause;

and, under such circumstances, he gives her a general credit for necessaries, for which he will be liable to any one furnishing them.

In order to enable a plaintiff to recover for necessaries furnished the insane wife of the defendant, when compelled to leave his house, on account of either his cruel treatment, or because of his making lewd and profligate women inmates of her home, it is not necessary that the plaintiff should show that he furnished such necessaries as the regularly appointed guardian of the wife.

Appeal from the Dubuque District Court.

Monday, April 4.

PLAINTIFF sues for the board and maintenance of defendant's wife, who was insane, and alleged to have left the husband's house, because of his cruel and inhuman treatment. Answer in denial; trial and judgment for plaintiff, and defendant appeals. The defendant asked the court to instruct the jury, that plaintiff could not recover, without showing that he was the regularly appointed guardian of defendant's wife. This instruction was refused—excepted to—and such refusal is now assigned for error.

J. L. Harvey, for the appellant.

Ben. M. Samuels, for the appellee.

WRIGHT, C. J.—The bill of exceptions recites, that evi dence was offered tending to show that the wife of defendant was, and had, for about the space of five years, been insane; that during that time, the defendant had frequently ill-treated her, by beating and confining her, and bringing into his house women of lewd character; and that at the time stated in the petition, she left the husband's house, and came to that of plaintiff, (her brother-in-law), who furnished her with board and clothing. There was no evidence that plaintiff had ever been appointed guardian of defendant's wife. Upon this state of facts, the defendant asked the instruction, that plaintiff could not recover, without showing

that he had been appointed such guardian. This was refused, and the jury instructed:

First. That the husband is bound only to make suitable provision for his wife at his own house; and that if she wilfully abandons him, she carries with her no credit of the husband, and can impose on him no liability.

Second. The husband is not responsible even for the necessaries furnished the wife, when residing apart from him, if she left without good cause, and against his consent. But if the separation was caused by improper treatment on his part, or if he assented to, or acquiesced in it, he is liable for her support, and to that extent she has credit on his account in the community.

Third. If the husband brings a profligate woman into his house, and permits her to remain there as an inmate, this is a sufficient ground to cause the wife to leave, and any one who furnishes her necessaries, may recover the value of them from the husband.

Fourth. That in order to recover, plaintiff must show gross indecency on the part of the husband, committed in the family, or just ground for apprehending personal violence on the part of the wife, as a cause for the separation.

Fifth. If the insanity of the wife was without a lucid interval, and so entire as to render her at all times insensible to any happiness or mental anguish, caused by the infidelity of the husband—if he provides for her wants, and be guilty of no cruelty, no person could, by harboring and furnishing her with necessaries, recover the value of them from him, although the acts of infidelity may have been committed in the homestead, and have been accompanied by gross indecency, such as bringing a profligate woman into the house. If, however, the wife had a lucid interval, during which she was capable of feeling the indignity and the disgrace, and left in consequence thereof, then the husband would be liable to any furnishing her with necessaries. Nor would a relapse into insanity affect the liability of the husband, so long as these lucid intervals

continued to recur." And the same rule was given to the jury for their government, in considering the question of personal violence offered by the husband to the wife.

These instructions were, at least, as favorable to defendant as he could ask. Clancy's Rights Mar. Wom., 28, 9, 30, 31; 7 N. H., 571; Evans v. Fisher, 5 Gilm., 571; 2 Kent, 146; 3 Bing., 127; McGahay v. Williams, 12 Johns., 293; McCutcheon v. Same, 11 Ib., 281; 3 C. & P., 15; Blowers v. Sturtevant, 4 Denio, 49; 1 Selw. N. P., 281; 2 Bights H. & W., 10 and 11; Emery v. Emery, 1 Younge & Jer., 501; Lidlow v. Wilmot, 2 Stark., S7. And there is nothing to satisfy us, that the court would have been justified in giving that asked by him. The doctrine of the instruction numbered three, we may remark, was denied in Howard v. Heffer, 3 Taunt., 431; but the authority of that case was afterwards denied in Houliston v. Smyth, 3 Bing., 127, and Aldis v. Chapman, 1 Selw. N. P., 281; and it may 1.0w be stated as the settled law, that if the husband introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, his wife will be justified in withdrawing from his protection. and he will be bound to provide her with necessaries.

The opposite doctrine, in the language of Mr. Justice PARK, in the case from 8 Bingham is "abhorrent to every feeling of a man and a christian," and it "cannot be the law of England," (or of this country), "because it is not the law of morality or religion." And see Clancy's Rights Mar. W., 32; 4 Denio, 49.

But we turn to the more particular examination of the instruction asked. It is suggested that plaintiff claims in his petition, that he had been appointed guardian of the defendant's wife, and that he based his right to recover upon that appointment. This is not our understanding of the petition. Petitioner states that some proceedings were had in the county court, whereby he had reason to suppose that he had been appointed guardian, &c. Beyond this averment, and the denial of it in the answer, there is no-

thing tending to show that plaintiff claimed to be acting as such guardian, or that he predicated his right to recover upon such appointment. The language used, seems to be introductory to other and material averments; and may properly be treated as surplusage, and as such, disregarded.

Could the plaintiff recover, then, without showing that he had been appointed, and was the guardian of defendant's wife? Of this, we entertain no doubt. The wife was boarded and maintained by plaintiff, not as her guardian; she was received into his house and protection, and continued there, not because he held that relation to her: but because the husband, by his improper conduct, had rendered her departure from her home indispensable. The law requires the husband to supply his wife with necessaries—such as meat, drink, clothes, medicines, &c.—suitable to his degree and circumstances; and if he, by his treatment shall render her situation unsafe, or their home unfit for a modest and chaste woman to remain in, he sends her from home as effectually as if he turned her out of doors, without cause; and under such circumstances, he gives her a general credit for necessaries, for which he will be liable to any one furnishing them. It was in view of this obligation, that plaintiff furnished the necessaries to defendant's wife, and sought to make him liable. Her insanity would certainly not lessen his liability in this respect. How far such situation should legitimately operate to require plaintiff to return her to the husband's care and protection, if required; or what other effect it might have, under many possible circumstances, we are not now called upon to determine. We only determine that in order to enable the plaintiff to recover for necessaries furnished the insane wife of the defendant, when compelled to leave his house, on account of either his cruel treatment, or because of his making lewd and profligate women inmates of her home. it was not necessary that he should have furnished them as such, in taking her under his care and protection.

Judgment affirmed.

Foley v. Howard.

8 56 88 240

FOLEY v. HOWARD.

The single fact that a mortgage of real estate, is found upon the records of a county, raises no presumption of its delivery to, and acceptance by, the mortgagee, against the positive and unqualified denial of the mortgagee and those claiming under him, that he ever received such a mortgage, or had any knowledge thereof.

Nor is the finding of a mortgage upon the records of the county, an acceptance or knowledge of which is denied by the mortgagee and those claiming under him, presumptive evidence of a prior conveyance of the mortgaged premises, by the mortgagee to the mortgagor, or that the mortgagor had a title which the mortgagee, or those claiming under him, would be estopped from denying.

Acceptance of a mortgage by the mortgagee, is necessary to constitute a delivery; and if there is no delivery, there is no mortgage.

To constitute a delivery of a mortgage, there need not be an actual manual delivery of the instrument, by the mortgager to the mortgagee, but there must be some act upon the part of both, which, in legal contemplation, would be equivalent to it.

Appeal from the Scott District Court.

Monday, April 4.

In Chancery. The bill charges that on the 14th of April, 1851, complainant purchased of one Ibbotson, a certain part of out-lot 32 in the city of Davenport; and that Ibbotson then had a deed from Michael Howard for the property, and had executed to said Howard a mortgage, dated January 6, 1851, to secure the sum of eighty dollars, according to the tener of certain promissory notes, which are fully described. It is further stated that this deed from Howard to Ibbotson has been lost; that the mortgage was delivered to Howard, accepted and filed for record by him on the 14th of April, 1851, and is now owned by him, as well as the notes therein specified; that after the recording of this mortgage, the said Michael conveyed a portion of said real estate to William Howard; that William took his title with notice, and subject to the mortgage from Ibbotson

Foley v. Howard.

to Michael; that Ibbotson made a deed to complainant at the time of his purchase, which was recorded on the same day; that by the terms of his purchase, he was to pay off said mortgage debt, the remaining part of the purchase money (\$100), being paid at the time; that he had tendered to Michael the amount due on said mortgage, and requested him "to reconvey said property to complainant, which he refused to do;" and that he brings the money into court. The prayer is, that an account may be taken of what is due on the mortgage; and that the defendants, (the two Howards), may be decreed to deliver up said mortgaged premises to complainant, free from all incumbrances, and also all deeds and writings in their control relating to said property.

The answers deny that Michael ever sold the property to Ibbotson; that he ever made him a deed, or ever received from him a mortgage, as stated in the bill, or in any other manner, or at any other time, and asserts a want of all knowledge of any such instrument; and that William entered into the possession of the premises, after his purchase from Michael, in 1854, and made valuable improvements thereon, with the knowledge of complainant.

The replication denies all the new matter stated in the answer. The cause was heard upon these pleadings, and the following testimony:

First. The deed from Ibbotson to Foley, dated April 14, 1851, and recorded the same day. Second. A certified copy from the records of Scott county, of a mortgage from Ibbotson to Michael Howard, dated January 6, and recorded April 14, 1851.

This was all the testimony offered by the complainant. The respondents introduced:

First. A deed from Michael to William, dated March 5, 1853, and recorded November 15, 1854. Second. A deed from LeClaire to Michael for the premises, dated February 9, 1846, and recorded the same day. Third. The depositions of two witnesses, who swear, in substance, that Wil-

Vol. VIII.—8

liam Howard made improvements upon said premises as early as 1851, and had occupied the same since that time; that complainant knew of these improvements; that in 1851, complainant removed a shanty he had upon said land to another tract; and that while this shanty was being rebuilt, he stated that he considered the old place worthless, and that by abandoning it, he could get more ground for a less price.

The bill was filed August 14th, 1856, and upon a final hearing was dismissed. Complainant appeals.

James Grant, for the appellant.

Cook, Dillon & Lindley, for the appellees.

WRIGHT, C. J.—Upon one ground, at least, we feel quite clear that this decree must be affirmed.

It will be observed that the allegations of the bill, that Michael Howard conveyed the land to Ibbotson, and that Ibbotson made a mortgage to Howard, which was accepted and recorded by him, are each distinctly and definitely denied by the answers. These answers, it is true, are not sworn to; but the execution of the deed and mortgage, and their delivery, are affirmed by complainants. These affirmations are denied, and the burthen of proof rests with the party affirming. The title is found in Michael Howard, and from him it passes to William, and there it must remain, as against complainant, unless a previous conveyance was made to Ibbotson, of which William had either actual or constructive notice. There is no proof, or pretense of proof, direct, that Ibbotson ever received a deed from How-The complainant's case rests alone upon the mortgage found upon the record, and what he claims are the legal, legitimate, and proper presumptions and consequences resulting therefrom.

Michael Howard, as well as William, deny, as we have seen, all knowledge of any such mortgage. It is not shown

that the mortgagee ever received the mortgage or the notes—that he was present at the time of its execution—that he afterwards assented to it—that it was delivered to another person for him—that he requested the mortgagee to execute it—nor, in a word, that he ever claimed or expected any advantage therefrom. We say none of these things are shown. By this, we mean, there is no direct proof of them, nor any circumstances from which they may be inferred; unless the single fact that the mortgage was found upon the record, raises the presumption of its delivery and acceptance, and that against the positive and unqualified denial of respondents.

It seems to us that it would be a very novel and unsafe doctrine, to hold that the finding of this mortgage on the record, was presumptive evidence of a prior conveyance by the mortgagee to the mortgagor; or that the mortgagor had a title which the mortgagee, or those claiming under him, would be estopped from denying. The case stands quite different from what it would, if the acceptance of the mortgage was shown, or if it appeared that the mortgagee presented the same for record, or if it was found in his possession or under his control, as alleged in the bill. such circumstances, as between the parties to it, a presumption might arise of title in the mortgagor. A mortgage can be executed, however, without the presence of the mortga-If properly acknowledged or proved, it may be handed to the officer for recording by any person—the mortgagor, or a third person, as well as the mortgagee. If the mortgagee should subsequently assent to, and adopt the mortgage, such adoption as between the parties to it, might relate back to the time of its execution, though there was no evidence as to who presented it for record; and even though the mortgagor, or some third person, had presented it, without the knowledge of the mortgagee. In this case, however, there is no such adoption or assent; but, as far as the record shows, the mortgagee has uniformly disclaimed all knowledge of such an instrument, and all rights or

claim of advantage under it. Under such circumstances, we do not believe that the record of the mortgage is prima facie evidence of its delivery, even if it would be in any Acceptance by the mortgagee was necessary to constitute a delivery; and if there was no delivery, there was no mortgage. By this, we do not mean that there should have been an actual manual delivery of the instrument by the mortgagor to the mortgagee; but there must have been that which, in legal contemplation, would be equivalent to Thus, as we have seen, it might have been executed and recorded in the absence, and without the knowledge of the grantee, and yet his subsequent assent might operate to make the delivery effectual from the time of the execu-So, if in good faith, and at the instance of the grantee, the grantor should execute the deed, and hand it to a third person, or the recording officer, for the grantee, the delivery might be complete. And cases are not wanting to show, that there may be instances where the instrument would operate as a deed, though it was not parted with by the person executing it. Garnons v. Knight, 5 Barn. & Cresw., 671; note to Maynard v. Maynard, 10 Mass., 458. In all these instances, however, it is to be observed that it is pre-supposed that the manner of delivery was shown by competent and sufficient testimony; and that there was eith er an actual delivery, or the existence of those circumstances which amounted in law to the same thing. So, there may be some things which would be prima facie evidence of a delivery, as, for instance, the possession and production of it by the grantee; while, on the other hand, its being found in the hands of the grantor, raises a presumption against any delivery. Hatch v. Hoskins, 5 Shepl., 39. No such presumption arises, however, from the fact that it is found recorded, where the grantee has done no act recognizing its existence or validity, but where, on the contrary, he expresses his dissent and disapproval.

It is true that our law makes a duly authenticated copy of such an instrument competent evidence, whenever, by

the proper proof, the absence of the original is accounted for. Code, section 1228. This was intended, however, to give a rule for the manner of proving such instruments, in the absence of the original, and was not designed to give it any greater effect than the original itself would have. The delivery of the instrument stands as an independent fact; and, under the circumstances of this case, no light is thrown upon it by the production of the authenticated copy.

It is also true, that as a general rule, a party is presumed to assent to a grant which is plainly beneficial to him. But, in the first place, it is not perceived that the rule has any application in this case, for, as suggested by appellees, it is not easy to comprehend how this mortgage could have this beneficial effect. But, in the next place, the rule has more particular reference to that class of cases, where the grant was, at the time of its execution, beneficial, and where there has been a subsequent assent by the party benefited. Not so, where, to say the least of it, the benefit is doubtful, and where the grantee disclaims all right or benefit under the instrument.

Entertaining this view of the case, it is manifestly immaterial to inquire how far, under other circumstances, William Howard would be estopped from denying the title of complainant. The doctrine of estoppels, in our opinion, has no place in the case. Neither need we determine what would be the effect of the mortgage, even if its delivery was shown, in the absence of all proof of any deed or conveyance from Michael Howard to Ibbotson. Nor is it necessary to ascertain whether any possible presumption of the acceptance of the mortgage by the grantor, resulting from its being found upon record, is not conclusively rebutted by the other circumstances of the case. All these, and other questions, we omit to notice, as the above views, in our opinion, render such examination unnecessary.

Decree affirmed.

Willey v. Hall.

WILLEY v. HALL.

When the question as to the admissibility of a witness, is intended to be raised for the determination of the appellate court, it should appear from the bill of exceptions, not only that the objection to the admissibility of the witness was overruled by the court, but that the witness was sworn, and gave evidence material to the issue.

A written agreement may be varied by evidence of a subsequent parol agreement, additional and suppletory to the original contract, and upon a new consideration.

So, it may also be shown by parol evidence, that the parties to a written contract, by a parol contract subsequent to the written one, abandoned the latter, except so far as applicable to the new parol agreement.

Appeal from the Jackson District Court.

TUESDAY, APRIL 5.

This was an action on an account for work and labor done. The work was done by one Williams, for the defendant, and the account assigned by him to Mathews & Reeves, who commenced suit thereon. During the pendency of the action, they assigned the claim to Willey, who was, on motion, substituted by the court as plaintiff.

During the trial, Williams was offered as a witness by the plaintiff. Being examined on his voire dire, he stated that he had assigned the account sued on to Mathews & Reeves, for a valuable consideration, in payment of a claim held against him, by them, for goods, wares and merchandize. The defendant then objected to the witness giving any evidence. The court overruled the objection, and defendant excepted.

The plaintiff had declared as in assumpsit, for the value of certain brick work alleged to have been done by said Williams for defendant, at his request, and for which he had promised to pay the said Williams, what the said work was reasonably worth; and plaintiff alleges that the same was reasonably worth nine dollars per thousand, amounting to

Willey v. Hall.

the sum of \$1,417.00. The defendant answers, denying any such promise, or indebtedness to plaintiff; and averring that said Williams and defendant, on the 27th of September, 1856, made an agreement in writing, whereby Williams agreed to furnish the necessary materials, and to do all the brick work in the erection of a building for a flouring mill, of the size of forty by forty-five feet; with an engine house attached, forty by eighty feet; that Hall was to have the foundation for the same ready by the 10th of April, 1857, and to pay the said Williams for his work at the rate of eight dollars and fifty cents per thousand, of which the sum of three hundred dollars was to be paid by the first day of January, 1857, one half of the remainder of the price of the work to be done, to be paid as the work progressed, and the other half when the work was completed; that the brick work of the mill was to be done by the 1st of June, 1857, and the engine house by July 1, 1857; that afterwards by agreement of parties, the said defendant increased the size of said building to forty by sixty feet; and that it was agreed by the parties that such alteration by defendant of the size of the said building, should in nowise affect said written agreement between said Williams and defendant, except that such additional length of time as was reasonable should be allowed to the said Williams for the completion of the increased amount of work rendered necessary by the change of the size of the building, and that the terms and time of payment were to remain the same as fixed in said written agreement; that the defendant erected the foundation for the building, and had the same ready for the brick work, within thirty days after the time fixed by the written agreement; but that the said Williams has not built the said mill, but has left the same incomplete and unfinished, and has not commenced to erect the said engine house, or bestowed any labor on the same.

The plaintiff, in reply, admits the making of said written agreement, but avers that the same was wholly abandoned by defendant; and that he failed to provide a foundation for

Willey v. Hall.

said building, and failed to make the payments to Williams as therein agreed upon. He denies that Williams made any agreement with defendant for changing the size of the building, or that such change should not affect said written agreement as alleged, or that the change in the size of the building, was made with any such understanding. He denies that any time was stipulated within which said enlarged building was to be completed, and denies that Williams ever agreed to complete the same, or at any time, since the abandonment of said written agreement, agreed to build or finish said engine house. He further avers, that Williams having commenced the erection of said building for defendant, ceased to work upon the same by reason of the failure of defendant to furnish timbers for the floor of the third story.

The defendant, rejoining to the replication of the plaintiff, denies that he abandoned the said contract in his answer set forth; and denies that said Williams ceased to work on said building by reason of the neglect of defendant to furnish timbers for the third story.

On this issue joined by the parties, the defendant, in the language of the bill of exceptions, "offered to prove by parol, an agreement made subsequent to the original agreement, new and distinct from the original agreement, and upon a new consideration—which agreement was additional and suppletory to the original agreement, and adopting the provisions of the original agreement so far as applicable to the new agreement."

To the introduction of this evidence the plaintiff objected; the objection was sustained and the evidence excluded. The jury found a verdict for the plaintiff, for \$1,030,75. A motion for a new trial was overrruled, and there was judgment on the verdict. Defendant appeals.

D. F. Spurr, for the appellant.

Charles Rich, for the appellee.

STOCKTON, J.—When a question as to the admissibility of a witness, is intended to be raised by bill of exceptions, for the determination of this court, it should appear, not only that the objection to the admissibility of the witness was overruled by the court, but that the witness was sworn and gave evidence material to the issue. In this instance, the bill of exceptions does not show that Williams was sworn as a witness; that he gave any testimony; or that his testimony, if any was given, was in anywise material. It is not even shown what objection was made to the competency of Williams as a witness, and, under the circumstances, we cannot say that there was any error in overruling the objection.

We think that one, at least, of the questions at issue between the parties, was, whether by their parol contract, subsequent to the written one, they abandoned the latter, and agreed to a change of the size of the building, and the time of its completion, adopting the provisions of the written agreement, so far as applicable, to the new one, as to the terms and time of payment. Under this state of the pleadings, we thing the evidence offered by the defendant, to prove such subsequent parol agreement, should have been received by the court; and for the error in rejecting the same, the judgment will be reversed.

Judgment reversed.

ALLEN v. NEWBERRY.

The pleadings in a cause, unless the contrary appears, make up the issue, with reference to the right of the plaintiff to recover at the time he commenced his action.

Where a matter of defense arises after the commencement of the action, it cannot be pleaded in bar of the action generally; but if it arises before plea or continuance, it must be pleaded as to the further maintenance of the suit; if after plea pleaded, and before replication, or after issue joined, then puis darrien continuance.

Vol. VIII.-9



- The rule at common law as to the time and manner of pleading, is not changed by the practice under the Code.
- Evidence cannot be given of matter arising after the commencement of the action, whether it occurred before or after plea pleaded, unless the foundation has been laid by the proper pleadings.
- Where in an action on a promissory note, the answer "denies that the plaintiff holds against him any such notes as are described in his petition," such a denial, without more, relates to the time of commencing the action; and means only that it is denied, that plaintiff holds such notes as are described.
- Where in an action on a promisssory note, commenced in the name of the payee, the defendant relies upon the fact, as a defense, that the plaintiff has transferred his interest in the cause of action, he should plead affirmatively that the note was the property of another, naming him, and that such other person was the real party in interest.
- Parties cannot make an agreement, before action, in relation to the assignment of a written contract, that shall have the effect of placing upon the record, a plaintiff who has no real interest in the prosecution of the action.
- After an action has been commenced, however, the plaintiff may sell and dispose of the judgment he may recover, without investing the person purchasing it, with the legal interest to the *chose in action*; and under such an assignment, it would be improper for the court to substitute the holder of it as plaintiff in the action, with the power to prosecute in his own name.
- Where in an action on four promissory notes, commenced in the name of the payee, before the defendant answered, there was filed with the papers in the cause, an instrument in writing, as follows: "Whereas, I, T. F. A., have commenced a suit in the district court of D. county, to the November Term, 1857, vs. S. N., claiming \$5,000, as money due me on four promissory notes, on which an attachment has been issued: Now, therefore, in consideration of the sum of \$1,500, to me in hand paid by L. N., of the same place, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and set over to the said L. N., for said consideration, said suit, and the claim, &c., and all the interest which I have in and to the same, and any judgment I may recover in said district court, in said cause; and authorize the said L. N., in my name and stead, to prosecute said suit in my name and stead to final judgment, and receipt for the same to the said S. N.; and generally to do and perform all acts and things in my name, that may be necessary for him to do, to perfect his judgment lien, and to collect the same, against the said S. N. as fully as I myself could do-he at all times acting only for his benefit, and in his behalf; and I hereby, for the consideration aforesaid. authorize the said L. N. to prosecute the said claim, so in my name as aforesaid, but at his costs-hereby covenanting that I will in no event

claim anything that may be recovered in said suit, or that may be obtained in said case against said S. N. Witness my hand, this 12th of October, 1857," and which was signed by the plaintiff; and where the defendant answered, admitting the execution of the notes, and denying "that plaintiff holds against him any such notes as are described in his petition;" and where on the trial of the cause, the plaintiff offered the notes in evidence, on which notes there were no indorsements, and thereupon the defendant called the attention of the court, to the said assignment on file, and asked that the jury be instructed to find for said defendant, on the ground that the said assignment showed that the suit was not prosecuted in the name of the real party in interest; and where the court ruled that judgment could not be rendered in the name of the plaintiff, but that he might amend, by substituting the assignee in his place, and take a continuance of the cause, which the plaintiff declined to do, and the court then instructed the jury to find for the defendant; Held, 1. That it was error to instruct the jury to find for the defendant; 2. That the assignment did not invest the assignee with the legal interest in the notes, and was only a transfer of the judgment the assignor expected to recover.

Appeal from the Dubuque District Court.

TUESDAY, APRIL 5.

This action was commenced in October, 1857. The cause of action is four promissory notes, upon which plaintiff claims the sum of five thousand dollars. The answer was filed November 4, 1857, and admits the execution of the notes. It denies, first, that the sum demanded is due from defendant to plaintiff; second, "denies that plaintiff holds against him any such notes as are described in his petition;" and third, avers payment. After the commencement of the action, and before answer, there was filed with the papers, the following instrument in writing:

"Whereas, I, T. F. Allen, have commenced a suit in the district court of Dubuque county, to the November term, 1857, v. Samuel Newberry, claiming five thousand dollars, as money due me on four promissory notes, on which an attachment has been issued. Now, therefore, in consideration of the sum of fifteen hundred dollars, to me in hand paid by Luther Nichols, of the same place, the receipt whereof is hereby acknowledged, I do hereby sell, transfer,

and set over unto said Nichols, for said consideration, said suit, and the claim, &c., and all the interest which I have in and to the same, and any judgment I may recover in said district court in said cause; and authorize the said Nichols, in my name and stead, to prosecute said suit in my name and stead, to final judgment, and receipt for the same to said Newberry; and generally to do and perform all acts and things in my name, that may be necessary for him to do, to perfect his judgment lien, and to collect the same against the said Newberry, as fully as I myself could do, he at all times acting only for his benefit and in his behalf; and I hereby, for the consideration aforesaid, authorize the said Luther Nichols to prosecute said claim so in my name as aforesaid, but at his costs; hereby covenanting that I will, in no event, claim anything that may be recovered in said suit, or that may be obtained in said case against said Newberry. Witness my hand, this 12th of October, 1857."

T. F. Allen."

On the trial of the cause, plaintiff introduced the original notes in evidence, which notes were not transferred or indorsed, but appeared to be payable and owing to said Allen. The defendant then called the attention of the court to the paper, a copy of which is given above, and asked that the jury be instructed to find for him, on the ground that the said written instrument showed that the suit was not prosecuted in the name of the real party in interest. The court ruled that judgment could not be rendered in the name of plaintiff, but that he might take leave to amend, by substituting the assignee in his place and stead, and take a continuance of the cause. This, the counsel for plaintiff declined, and the court instructed the jury to find for defendant. Plaintiff excepted, and appeals.

J. S. Blatchley, for the appellant.

W. T. Barker, for the appellee.

WRIGHT, C. J.—The pleadings in a case, unless the con-

trary appears, make up the issue, with reference to the right of the plaintiff to recover, at the time he commenced his ac-If a matter of defense arises after the commencement of the action, it cannot be pleaded in bar of the action generally; but if it arises before plea or continuance, it must be pleaded as to the further maintenance of the suit. If after plea pleaded, and before replication, or after issue joined, then puis darrien continuance. This was the rule at common law, and the principle is not changed by our practice. 1 Chitty Pleadings, 695; Colden v. Rich, 7 Johns., 194; Cowell v. Weston, 20 Ib., 414. Evidence cannot be given of matter arising after the commencement of the action, whether it occurred before or after plea pleaded, unless the foundation has been laid by proper pleadings. In this case, the matter relied upon, and given in evidence, arose after the suit was commenced, but before defendant answered. failed to set it up, however, and should not, therefore, have been permitted to rely upon it. It is true that defendant denies that plaintiff holds against him any such notes, as are set out in the petition. This averment, without more, relates to the time of commencing the action; and, at that time, there is no controversy as to who was the real party in interest, whatever may be the subsequent effect of the written agreement. But, aside from this, such an averment would not be sufficient to raise the issue, under which to offer the proposed testimony, if it could be made to relate even to the time of the plea pleaded. Giving the language used a fair and natural construction, and giving to the plaintiff the benefit of any ambiguity, it means only that it is denied that plaintiff holds such notes as are described—the design being to put stress upon the description used, rather than upon the thought that the notes sued on were held by, and had become the property of another. It, if at all, presents the issue in a negative form, when it should have been made by an affirmation, that the notes were the property of another, naming him, and that such other person was the real party in inter-Nor does the fact that the assignment (as it is called),

was found among the papers, make any difference. The issue should have been presented in the proper manner, that all chance for suspicion might be removed. If properly presented, and the plaintiff thus given an opportunity to prepare his case, he may have had much testimony to explain the paper relied upon by defendant. The first that is heard of it, however, is after the testimony is closed, and the court is called upon to instruct the jury. Under such circumstances, we think the instruction should have been refused, and that it was erroneous to direct the jury to find for defendant.

Counsel have directed their argument, however, more particularly to the force and effect of the writing itself, and have considered the instruction as being right or wrong, according to the construction the said writing may receive. We will very briefly examine the case, as thus presented.

Civil actions are to be prosecuted in the name of the real party in interest. Code, section 1676. At law, this means the party having the legal interest; and hence it has been decided, that the holder of a note, not negotiable by delivery, nor assigned, could not sue upon it in his own name, though the real owner of it. Furwell v. Tyler, 5 Iowa, In that case, there was no pretense that the claim had been assigned, or transferred in writing. In this, there is a writing, and the question is, what effect shall be given to it? It is not denied that a note may be transferred, so as to vest the legal title in the holder, by a separate writing; and that the indorsement or transfer need not be made upon the note And, however made, if complete, so as to vest the title to it in the holder as the legal owner, he must sue in his own name, notwithstanding authority is given in the transfer or indorsement, to sue in the name of the payee or indorser. In such a case, the parties cannot make any agreement that shall have the effect of placing upon the record, a plaintiff who has no further real interest in the prosecution of the After an action has been commenced, however, the plaintiff may sell and dispose of the judgment he may recover, without investing the person purchasing it with the

legal interest to the thing in action. Under such an assignment, it would be improper to substitute the holder of it as plaintiff, with the power to prosecute in his own name. And taking the writing, made in this case, in all its parts, we are inclined to either give it this latter character, or to conclude that it was not the intention to invest Nichols with the legal title to the notes.

It will be observed that it is nowhere stated that the plaintiff transfers or assigns the notes. The suit, the claim and the judgment, are spoken of as sold and transferredlanguage amply sufficient to enable the transferee, in equity, as between him and the plaintiff, to control the action; and to give him equitable rights against the defendant, after notice of the transfer. And this is evidently all that was intended. The action—the suit—the judgment is the subject of the transfer; and hence, the first part of the agreement refers, with some degree of minuteness, to the court where the action was pending-when it was commenced—the amount claimed, and upon what—and to the fact that an attachment had been issued. If the notes were intended to be transferred or assigned, it would seem that they would have been described and referred to particularly. Not only so, but this construction makes the instrument legally consistent. It is provided therein, that "the suit or claim is to be prosecuted in the name of the plaintiff." This could not be done, if he had parted with the legal interest in the notes. By allowing it to be prosecuted in his name, therefore, we carry out the intention of the parties, and violate no rule of construction. The opposite construction would render it impossible to do what the parties to the agreement have expressly provided should be done.

Two other queries arise:—First. The language of the law is, that civil actions shall be prosecuted in the name of the real parties in interest. If, therefore, the prosecution is commenced in the name of the proper party, can it make any difference that, after this and before judgment, the

Updegraff v. Bennett.

claim, or demand sued on, may have been transferred? If this fact was shown, would it be so material as to defeat the plaintiff's action?

Second. While civil actions are to be thus prosecuted in the name of the real party in interest, yet by section 1677 of the Code, it is provided that this is intended merely to prescribe a rule of practice, and is in nowise to affect substantial rights. Now, what does this mean, more than that, as a rule of practice, suits are to be prosecuted by the real parties in interest; but if substantial rights are to be affected by adhering to the rule, then it may be departed from? And therefore, if a party sells to a third person, his interest in a claim upon which suit has been brought, but stipulates that it shall continue to be prosecuted in his name, why are not substantial rights affected, if a substitution or change is held necessary?

These queries we merely suggest. To do more in this case, and at this time, is unnecessary.

Judgment reversed.

UPDEGRAFF v. BENNETT.

In an action by a father, to recover damages for the seduction of his minor daughter, the petition need not allege that she was the "unmarried daughter" of the plaintiff, nor that she was of "previously chaste character."

The right of a father to recover for the seduction of his minor daughter, has not been changed by the Code, but the rule has been so relaxed, that he may now recover, although such minor daughter be not living with him, and there may be no actual loss of service.

Appeal from the Jackson District Court.

TUESDAY, APRIL 5.

THE plaintiff claims damages for the seduction of his daughter by the defendant. The petition alleges that the defendant, "contriving, and unlawfully and unjustly intend-

Updegraff v. Bennett.

ing, to injure the plaintiff, and to deprive him of the service and assistance of Rosanna Updegraff, of the age of sixteen years, the minor daughter and servant of plaintiff, on, &c., seduced, debauched and carnally knew the said Rosanna, she then and there being the minor daughter and servant of the plaintiff, whereby," &c. The defendant answered, denying specifically the facts alleged; and the cause being tried by a jury, a verdict was returned in favor of plaintiff, for the sum of six hundred dollars. The defendant moved the court to arrest the judgment on the verdict, for the reason, "that the said Rosanna is not alleged in the petition to have been, at the time of her alleged seduction, an unmarried female of previously chaste character. The motion was sustained, and the judgment arrested. Plaintiff appeals.

S. P. Adams and B. W. Poor, for the appellant.

No appearance for the appellee.

STOCKTON, J.—The plaintiff's petition in this case was sufficient, and the motion in arrest of judgment should have been overruled.

The right of the father to recover for the seduction of his daughter, has not been changed by the Code. Where the suit is to recover for the seduction of a minor daughter, this rule has been relaxed, and the father may now recover, though such minor daughter be not living with him, and although there may be no actual loss of service. Code, section 1697.

The petition in this case, is drawn in accordance with the forms given by Mr. Chitty, (2 Chitty's Pleadings, 643, 856), in which the person seduced is averred to be the "daughter and servant" of the plaintiff. It is not held necessary to allege, that she is the "unmarried daughter of the plaintiff;" and there is nothing in the Code to justify the conclusion, that the father must allege in his petition, that his daughter was of "previously chaste character."

Vol. VIII.—10

Terpenning v. Gallup et al.

The judgment will be reversed, and the cause remanded, with directions to the district court to render judgment on the verdict.

Judgment reversed.

TERPENNING v. GALLUP et al.

A party in the constructive possession of real estate, may maintain an action of trespass quare clausum fregit.

In such cases, the general property draws to it the possession, where there is no intervening adverse right of enjoyment.

In trespass, the *time* when the trespass was committed, is not ordinarily material to be proved as alleged—the plaintiff being at liberty to prove a trespass at any time before the commencement of the action, whether before or after the day laid in the petition.

The appellate court will never presume against the correctness of a verdict, but always in favor of it.

Where in an action of trespass quare clausum fregit, the jury rendered a verdict against all of the defendants, among whom was one O.—all of whom moved in arrest of judgment and for a new trial; and where on the hearing of the motion, the plaintiff asked the court to set aside the verdict as to said O., which was granted, and thereupon the court overruled the motion to set aside the verdict as to the other defendants; Held, That the proceeding was not erroneous.

In an action ex delicto, against several defendants, it is competent for the court, after the verdict, to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict as to the others.

Appeal from the Union District Court.

Tuesday, April 5.

TRESPASS quare clausum fregit, for that defendants, on, &c., at, &c., did enter upon the lands of petitioner, and injure, destroy, pull down, and carry away, the dwelling houses, out-houses, stables, fences, steam saw-mill, engine, and all the other tenements, buildings and improvements "situate

Terpenning v. Gallup et al.

and being thereon, erected and built, and attached to the said premises of the property of said petitioner," &c. swers by all the defendants, denying the petition and further setting up; First, As to the steam mill and engine, that one of the defendants (Orr) owned the same, and had a legal right to remove the same from the premises described in the petition; and that they took down and removed the same, under the said right and authority in the said Orr; and, Second, As to the houses, out-houses, &c., that they were built on the premises described by one of the defendants, (Gallup), with the knowledge and permission of plaintiff, with the understanding and agreement that they are the individual property of the said defendant; that he had the right to remove the same when a certain partnership, (which is set out), was dissolved, or sooner, at the pleasure of said defendant; and that under this agreement they were removed, &c. Replication in denial of all the new matter contained in the answer. Verdict for plaintiff—motion for a new trial overruled—and defendants appeal.

Riggs & McDill, for the appellants.

WRIGHT, C. J.—The errors assigned are:

First. In overruling defendant's motion for a new trial. Second. In sustaining plaintiff's motion to set aside the verdict as to defendant Orr.

Third. That judgment was entered contrary to the finding of the jury.

The motion for a new trial assigned for cause, that the verdict was against the law and evidence.

None of the instructions, (if any were given), are before us. Nor is there any pretense that the record contains all the evidence. There is, it is true, a bill of exceptions, in which it is certified "that the foregoing embodies the substance of the testimony as to the plaintiff's possession of the premises in his petition mentioned," but what testimony was

Terpenning v. Gallup et al.

introduced upon other parts of the the case, does not appear. The claim is, however, that the testimony thus embodied, fails to show that plaintiff had such possession of the premises as to enable him to maintain the action. To this, it may be answered, that if it was his duty to prove that he had actual possession (as is assumed in appellant's argument), we should be unwilling to say, that the verdict was so far against the evidence as to justify a new trial. And especially would we be disinclined to reverse for this cause, when, as the record shows, the plaintiff has twice obtained a verdict, (the first one having been set aside). But when it is remembered, that if plaintiff was in the constructive possession of the property, he could maintain the action, all possible room for doubt is removed. 2 Greenl. Ev., sec. 614, and authorities there cited; Dorcey v. Patterson, 7 Iowa, 429. The rule is, that the general property draws to it the possession, where there is no intervening adverse right of enjoyment; and while we might admit, that there was not sufficient testimony to show that plaintiff was in the actual possession of the premises, we are not advised as to what proof he introduced upon the subject of ownership or general property, and, therefore, cannot say that the verdict was not justified by the evidence.

It is claimed, however, that plaintiff from his own title, as set out in his pleadings, makes it manifest that he was not the owner at the time of the commission of the alleged trespass. The argument is, that the trespasses are laid in June, 1856, and that from his own showing, he obtained his title in September of that year. The rule upon this subject is, that the time when the trespass was committed, is not ordinarily material to be proved as laid; the plaintiff being at liberty to prove a trespass at any time before the commencement of the action, whether before or after the day laid in 2 Greenl. Ev., sec. 624. For aught that the declaration. appears, the jury were instructed to consider the injuries done after the title was acquired in September, and before the commencement of this suit, and for such injuries alone they may have awarded damages. We will not presume

Berner v. Frazier.

against the correctness of the verdict, but always in favor of it.

The second and third assignment of error involves the same question. The jury returned a verdict against six of the defendants, and among others, E. S. Orr. All of them moved in arrest of judgment, and for a new trial. When this motion came on for hearing, plaintiff's counsel waived the benefit of the verdict so far as it related to said Orr; or, as it is stated in another part of the record, plaintiff asked the court to set aside the verdict as to Orr, which motion was sustained; and said verdict was set aside as to said Orr, and overruled as to the other defendants. The objection now is. that if the verdict was set aside as to one of the defendants, it should have been to all—that it was an entirety—and that the judgment must strictly follow the verdict. We do not so understand the law. In this action, the jury could have found all the defendants guilty, or all not guilty, or a part guilty and the other not guilty. And after verdict, it was perfectly competent, for the court, to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict as to the others. Code, secs. 1815, 16.

Judgment affirmed.

Berner v. Frazier.

Where a party to an action before a justice of the peace, files his affidavit, and moves for a change of venue, on the ground that the justice is so prejudiced against him, that he cannot obtain justice before him, it is error to refuse a change of venue.

Appeal from the Monroe District Court.

TUESDAY, APRIL 5.

Berner sued Frazier in an action of trespass before a

Berner v. Frazier.

justice of the peace. Before the jury were sworn, or the trial commenced, the defendant filed his affidavit, and moved the court for a change of venue, on the alleged ground that the justice of the peace was so projudiced against him, that he could not obtain justice before him. The motion was overruled. A motion for a nonsuit was also overruled, and the cause being fully heard, the jury returned a verdict for the plaintiff of ten dollars, for which judgment was rendered in favor of plaintiff, with ten per cent. damages.

The cause was taken to the district court by writ of error, and the court found that there was "error in the proceedings before the justice, in that the justice rendered judgment for the amount found by the jury, with ten per cent. interest." It was thereupon adjudged by the court, that the cause be remanded to the justice, and that he correct the judgment rendered by him, by striking out from the judgment the ten per cent. interest. The defendant appeals from this judgment to this court.

T. B. Perry, for the appellant.

No appearance for the appellee.

Stockton, J.—If the only error in the proceeding before the justice, had been in his allowing interest on the judgment in favor of the plaintiff, at the rate of ten per centum per annum, the ruling of the district court in remanding the cause, with directions to the justice to strike out the ten per cent. interest, would have been proper enough. But the defendant was entitled to a change of venue, on the motion and affidavit filed by him; and the court should have reversed the judgment of the justice, and remanded the cause, with directions to him to allow the change of venue as prayed for by defendant. See Act of January 24, 1852, sec. 1; Session Acts, 94; Marshall & McKee v. Kinney, 1 Iowa, 580; Lyne v. Hoyle, 2 G. Greene, 136.

The judgment of the district court is reversed, and the

Lyon v. Tevis.

cause remanded, with directions to reverse the judgment of the justice, and remand the cause to him, with directions to allow the change of venue.

Judgment reversed.

Lyon v. Tevis.

Where the record of a cause is so confused that the appellate court cannot act upon it with safety to the rights of the parties, the cause will be remanded, with leave to the parties to replead.

A person who acts as the mere agent of another in a transaction, ought not to be made a party to a suit, unless he is charged with fraud in the transaction. He has no interest in the suit, and the other parties have a right to his testimony.

Bill to enjoin the collection of a judgment, alleged to have been paid. The attorney who obtained the judgment for the plaintiff, was made a party respondent. Demurrer to the bill for that reason; *Held*, That the attorney was an improper party.

Appeal from the Polk District Court.

TUESDAY, APRIL 5.

IN CHANCERY. Bill sets up that a certain judgment in favor of Tevis, Scott & Tevis, and against the firm of Cole, Lyon & Co., has been fully paid, and prays an injunction, &c. Decree in favor of complainant, and respondents appeal. For the material facts, see the opinion of the court.

Cassady & Crocker, for the appellants.

Cole & Jewett, for the appellees.

WRIGHT, C. J.—The merits of this case, we shall not undertake to examine. To do so, with any degree of safety to the rights of either party, would be utterly impossible upon a record so confused and inexplicable. The bill was filed in October, 1856, and the decree rendered in 1858. During



Lyon v. Tevis.

this time, there was an amended, and what is called an amended or another petition, filed—two motions to dissolve the injunction—and two demurrers to the petitions. One demurrer was overruled, but no disposition seems to have been made of the other, nor was any action ever had upon either motion. There was a motion to strike the amended petition, and one by the complainant to strike the demurrer to what is called "the amended or another petition." journal entry shows that the motion to strike the amended petition was sustained; whereas, a bill of exceptions found in the record, recites that the motion of complainant to strike the respondent's demurrer was sustained. While it is not very clearly shown, yet it is fairly inferrable that the pleadings were all lost at one time, and that the third (or "another petition,") was filed to supply the loss, and designed to be substituted for the original bill and the amendment to it. Subsequently the papers were found; but whether the cause was heard upon the substituted or original bill, it is impossible to tell. If upon the substituted, then there was an answer to it by one of the parties, and it would have to be taken as true as against bim. If upon the original, then the record shows that the amendment to it was stricken from the files, and all the respondents answered the bill as first filed. And, again: the decree recites that the cause came on for hearing upon the pleadings, exhibits, &c. Whether the papers and records in the judgment at law, which was enjoined in the action, were used in evidence, as exhibits, or otherwise, is left in great uncertainty. The parties differ, and the record leaves it in such doubt that we cannot determine.

Under these circumstances, we shall remand the cause, that the parties may have an opportunity to replead. There is no doubt as to our power to make such an order, and this is, in every respect, such a case as to call for its exercise.

There is one question in the case, however, that we may determine at this time. Cassady was the attorney of Tevis, Scott & Tevis, in procuring the judgment against complainant, and had charge of its collection. He was made a party

Lyon v. Tevis.

in this case, and demurred upon the ground that he was improperly thus joined, not having any interest in said suit. The same objection is now urged in this court, and we think it is well made. There is no charge of fraud or combination on the part of the attorney. While acting for his client, it is charged that he recovered an amount sufficient to satisfy the judgment. If so, then his clients received it: for, as against complainants, when it was paid to him, it was paid to them. If he did not receive it as their attorney, then he would be liable to complainant in his individual capacity, and not as the agent of his clients. A person who acts as the mere agent of another in a transaction, ought not to be made a party, unless he is charged with fraud. He has no interest in the suit, and the other respondents have a right to his tes-Story's Eq. Plead., secs. 231-2; 2 Story's Eq. Jur., secs. 1499, 1500; Mitf. Ch. Pleadings, 189. The practice of making a mere agent a defendant to a suit, has, of late, been regarded as a practice of a very anomalous character, and open to serious objection; and it has been said, that it will not be extended to any cases to which it has not already been applied. "It seems to be limited to cases of fraud, as that word is generally understood in a court of equity, and does not apply where, though the agent acts erroneously, he acts openly and avowedly." Attwood v. Small. 6 Clark & Frem. 352; Marshall v. Sladden, 7 Hare, 428.

As far, then, as shown by the pleadings, as they now stand, Cassady was improperly made a party, and his demurrer should have been sustained. To this extent, the proceedings below will be reversed, and the cause remanded, with leave to the parties to replead.

Vol. VIII.—11

MORFORD v. UNGER.

The object of the act entitled "an act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, (Laws of 1856, 49), is sufficiently expressed in its title; and the said act is not in violation of section 26 of the third article of the constitution of 1846, which provides that "every law shall embrace but one object, which shall be expressed in its title."

Where the business of the general assembly, at a special session convened by the governor, is not restricted by some constitutional provision, it may enact any law at such special session, that it might at a regular session. The powers of the general assembly not being derived from the governor's proclamation, it is not confined to the special purposes for which it may have been convened by him.

The seventh section of the act entitled "an act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, which provides that the act shall take effect from and after its acceptance by the city council of Muscatine, and its publication at the expense of the city, is not a delegation of its powers by the general assembly to the people, or any other tribunal, and does not render the act invalid under the constitution of 1846.

The general assembly may provide, that the authority of a city shall not be extended over new territory, but upon the expressed consent of the people of the city.

The right of the general asembly to create corporations for municipal purposes, conferred by the constitution of 1846, is not made to depend upon the consent of the inhabitants, or proprietors of the land, on which the proposed city or town is situate.

So, the power of imposing a local government upon a town or city, includes the power of ascertaining the extent of the corporation and its just boundaries, as well as the powers to be vested in the local government; and among the powers deemed essential to the objects of the corporation, is that of levying such reasonable taxes upon the property within its limits as may be necessary for such local purposes as the corporation is authorized to accomplish.

Where the owner of land adjoining a city or town, lays the same off into lots, and invites purchasers and settlers to occupy it with dwellings or otherwise, he cannot object to a law extending the authority of the local government over him and his land so laid out and occupied.

But where the land is vacant, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement of the city limits, such an act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to

the city, to tax the land to a certain distance outside of its limits; and is, in effect, the taking of private property, without compensation, within the spirit and meaning of the constitution.

In such a case, the force and effect, and obvious intent of the act, is to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government, furnishes no legitimate basis for the act.

The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is a legitimate exercise of legislative power, while an indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, is without authority.

The act entitled "an act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, takes private property for public use, without compensation, and is unconstitutional and void.

Appeal from the Muscatine District Court.

THURSDAY, APRIL 7.

This is an action of replevin, to recover the possession of certain personal property described in the petition. The defendant justified the taking of the property, as marshal of the city of Muscatine, averring that he took the property by virtue of a precept or warrant, affixed to the tax list of said city, which was placed in his hands as his authority to collect the taxes due said city for the year 1857; and that he found the said plaintiff charged with the sum of \$103,00, as taxes due said city, on the tax list so placed in his hands, The answer sets out a copy of the warrant and tax list, and shows the due levy of, and non payment of the tax—to all which there was a replication in denial. ment for the defendant, and the plaintiff appeals. other material facts appear in the opinion of the court. By agreement between the parties, the only question submitted to the supreme court was, whether the act entitled "An act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, was constitutional?

D. C. Cloud, for the appellant.

- I. The act is unconstitutional, for the reason that the object of the act is not expressed in its title. Indiana Central R. R. Co. v. Potts, 7 Ind., 681; Cannon v. Hemphill, 7 Texas, 184; Story v. Daniel, 3 Ind., 348; 1 American Law Reg., 616; Constitution, sec. 26; Railroad Co. v. Com. of Clinton Co., 1 Ohio State, 77; Acts of 1856, 49.
- II. An extra session of the legislature could not enact this law, unless it was one of the objects for which it was convened, as set forth in the governor's proclamation. Const., of 1846, Art. 3, secs. 2 and 3; Art. 4, sec. 9.
- III. The act is void, for the reason that it was not enacted in the manner prescribed in the constitution. It must be re-enacted by the city council of Muscatine before its publication, and before its taking effect. Santo v. The State, 2 Iowa, 203; Railroad Co. v. Com. of Clinton Co., 1 Ohio State, 87; Maize v. The State, 4 Ind., 347; 1 Am. Law Reg., 659; People v. Collins, 2 Ib., 591.
- IV. The act is unconstitutional, for the reason that it takes from the plaintiff his rights, without any equivalent. Const. of 1846, Art. 1, sec. 1; Warner v. Charlestown, 3 Liv. Law Mag., 115; Marbury v. Madison, 1 Cranch, 137; Rice v. The State, 7 Ind., 132; Cobb v. Kingman, 15 Mass., 198; Ellis v. Marshall, 2 Ib., 269; Hampshire v. Franklin, 16 Ib., 76.

George S. Hebb, for the appellee, cited the following authorities: 1 Ohio State, 83; Hylton v. The United States, 3 Dallas, 171; 4 Ib., 14; 14 Mass., 345; 16 Pick., 95; 2 Monr., 178; 2 Iowa, 165; 2 Ib., 280; 10 Ohio, 235; 11 Penn. State, 70; 9 Dana, 514; Rice v. Foster, 4 Harrington, (Del.), 479; Fisher v. McGrier, 1 Gray, 1; Maize v. The State, 4 Ind., 342; State v. Cooper, 5 Blackf., 258; 2 Peters, 522; Ogden v. Sanders, 12 Wheat., 270; 19 Johns., 58; 1 Cowen, 550; Fletcher v. Peck, 6 Cranch, 87.

Richman & Brother, on the same side, cited the following additional authorities: 3 Wash. C. C., 313; 15 Wend., 133; 2 Scam., 79; 3 Ib., 127; The People v. Reynolds, 5 Gilman, 1; 8 Barr., 391; Savannah v. The State, 4 Georgia, 26; Belleville & Ill. R. R. Co. v. Gregory et al., 15 Ill., 20; Martin v. Broach, 6 Geor., 21; Coles v. Madison County, Breese, 120; Bush v. Shipman et al., 4 Scam., 190; Wilcox on Corp., 26; 2 Kent Com., 275; People v. Morrill, 21 Wend., 679; Story on Cont., 260; Bailey v. City of New York, 3 Hill, 531; Co. of Richland v. Co. of Lawrence, 12 Ill., 8; City of St. Louis v. Russell, 9 Mis., 507; Opinion of Supreme Court, 6 Cushing, 578; Harris v. Thompson, 9 Barb., 350; 2 Gilm., 237.

James Grant, for the appellant, in reply, cited The State v. Copeland, 3 Rhode Island, 33; Patterson v. Society, &c., 4 Zabriskie, 343.

STOCKTON, J.—The only question to be considered in this case is, whether the act of the legislature of Iowa, approved July 14, 1856, entitled "An act to amend the act to incorporate the city of Muscatine" is constitutional. By this act, it is conceded the limits of the city of Muscatine were extended about one mile on the east, and about two miles on the north and west, beyond its former boundary. plaintiff lived upon the territory brought into the city by the act aforesaid, upon land used exclusively for farming purposes, about one mile from the old city limits, and about the same distance from any lands laid out into city or town lots, or used as city property. His land, so used, was taxed by the city at the sum of one dollar per acre. This tax he refused to pay; and his property being destrained for the payment thereof, he brought this action of replevin, to test the constitutionality of the act extending the limits of the city.

It is objected that the object of the act is not expressed

in the title, and that it is, therefore, invalid in virtue of that provision of the constitution of 1846, which required that "Every law shall embrace but one object which shall be expressed in its title." Const. 1846, Art. 3, sec. 26. The object expressed in this instance, was to amend the act incorporating the city. With this object was consistent the purpose of enlarging the limits of the city. These limits were fixed by the act sought to be amended, and an alteration of them was one of the modes in which the act was subject to amendment. The general purpose was well expressed by entitling the act, "an act to amend the act to incorporate the city of Muscatine;" and, as entirely in consonance with such purpose, we think it was legitimate for the legislature to extend the limits of the city, or engraft any other provision not entirely inconsistent with the purpose of amending the charter then in force. If it could be objected, that by such enlargement of the limits, the city charter was not amended, there might be more plausibility in the objection that the object of the law was not expressed in its title. Santo v. The State, 2 Iowa, 209; State v. Co. Judge, &c., 2 Ib., 283; Belleville & I. C. R. R. Co. v. Gregory., 15 Ill., 20; Martin v. Broach, 6 Geo., 21; Walker v. Caldwell, 4 Lou. Am. Rep., 298; Succession of Lanzetti, 9 Ib., 329; Lafou v. Defroc, 9 Ib., 540; Davis v. The State, 7 Maryland, 151; Buttle v. Howard, 13 Texas, 345; Washington v. Murray, 4 California, 388.

II. The second objection made is, that the act in question was passed at an extra session of the general assembly, and was not one of the objects for which the same was convened.

It is provided by the constitution of 1846, (Art. 3, sec. 2), that "the sessions of the general assembly, shall be biennial, and shall commence on the first Monday of December next ensuing their election; unless the Governor shall, in the *interim*, convene the general assembly by proclamation." And Art. 4, sec. 9, provides that the Governor "may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened."

When lawfully convened, whether in virtue of the provision of the constitution, or the Governor's proclamation, it is the "General Assembly" of the state, in which the full and exclusive legislative authority of the state is vested. Where its business at such session, is not restricted by some constitutional provision, the general assembly may enact any law at a special or extra session, that it might at a regular session. Its powers not being derived from the Governor's proclamation, are not confined to the special purpose for which it may have been convened by him.

III. By the seventh section of the act, it is provided that the same shall take effect from and after its acceptance by the city council of Muscatine, and its publication at the expense of the city. It is objected by the plaintiff, that this section requiring that the act should be accepted by the city council, before taking effect, rendered the whole act invalid, as not being enacted in the mode prescribed by the constitution.

The general assembly, it is well held, cannot relieve itself of the responsibility of its functions, by submitting its acts to a vote of the people; the duties of legislation are not to be exercised by the people at large. Santo v. The State, 2 Iowa, 203; State v. Giebricht, 5 Iowa, 491.

It may be well, however, to inquire whether there has been, in this instance, any delegation of its powers by the legislature to the people, or to any other tribunal. The legislature might well provide that there has not been. the authority of the city should not be extended over the new territory, but upon the expressed consent of the people In this case, it provided that such consent should be given through the city council, by its acceptance of the act. To this, we think, there can be no valid objection, on the score of right or power. It was not a delegation of the legislative function. In questions affecting private rights, the legislature must often act with reference to the implied assent to, or acquiesence in, its acts, by the party or parties interested. In questions affecting municipal

government, their action is often necessary to carry it into effect; and whether expressed upon the face of the law, or not, the question of the acceptance or rejection of a charter, or amended charter, is a practical one, and necessarily involved in the passage or adoption of every such act. Santo v. The State, 2 Iowa, 203. In the City of Patterson v. The Society, &c., 4 Zabriskie, 343, it is held that a provision in a municipal charter, that the same shall not take effect until approved by a majority of the district incorporated, is not a delegation of legislative power, but is the mere question of the acceptance of a charter.

For the reasons above indicated, we think the act in question, is not liable to the objection that it was not passed into a law according to the forms of the constitution. It will not, therefore, be necessary for us to inquire further, whether so much only of the act, as provided for its taking effect on its acceptance by the city council, might not be held unconstitutional and void, and the remainder of the act permitted to stand in full force. Upon that branch of the subject, we will not do more than refer, for the rule of law, to a few authorities. State v. Santo, supra; Maize v. The State, 4 Ind., 342; Norris v. City of Boston, 4 Metc., 288; Fisher v. McGirr, 1 Gray, 22; Clark v. Ellis, 2 Blackf., 10; Sedgwick Const. Law, 165-6, 489; The People v. Reynolds, 5 Gilman, 1; Com. v. Judges, &c., 8 Barr., 391; Savannah v. The State, 4 Georg., 26.

IV. The remaining objections made to the act are, that it is for an extension of the authority of the city over the plaintiff, and all persons living in the extended limits, without their consent; and that the act takes from the plaintiff his property for public use, without just compensation.

The power to create corporations for municipal purposes, was given to the general assembly by the constitution of 1846, (Art. 8, sec. 2), in force at the time of the incorporation of the city of Muscatine.

The right of the legislature to enact such law, is not made to depend upon the consent of the inhabitants, or proprietors

of the land, on which the proposed city or town is situated. If such consent were requisite, then the consent of each proprietor must be first obtained; because the consent of no majority, however large, would bind a minority, however small; and the power of the legislature, in such a condition of things, would be merely that of effectuating the will of each individual proprietor.

If the legislature has the power to incorporate a town or city, the extension of the limits of such incorporation, and the bringing of additional land and people under the municipal authority, being an act of a like nature, depends for its authority on the same constitutional provisions. So, the power of imposing a local government upon a town or city, includes the power of ascertaining the extent of the corporation, and its just boundaries, as well as the powers to be vested in the local government. Among the powers deemed essential to the objects of the corporation, is that of levying such reasonable taxes upon the property within its limits, as may be necessary for such local purposes as the corporation is authorized to accomplish.

By the "act to amend the charter of the city of Muscatine," approved January 22, 1853, (Session Acts, 137), the city council are authorized to levy a tax of not exceeding one per centum, in any one year, upon the assessed value of the property in the city. By the act now in question, all the lands lying within the territory added to the city, not laid out into lots or out-lots, are not to be taxed otherwise than by the acre, according to the value of the same for agricultural, horticultural, mineral, or other purposes; but improvements thereon, it is provided, may be taxed at their full value. Sec. 5.

It is argued by the plaintiff that the extension of the limits of the city so as to include adjacent lands, without the consent of the owners, and the subjection of the same to the authority and taxing power of the city, is, in effect, taking private property for public use, without just compensation.

It has been held, in numerous instances, and the doctrine Vol. VIII.—12

can now hardly be seriously questioned, that with respect to municipal corporations which exist only for public purposes, the legislature, under proper limitations, may change, modify, enlarge, restrain, or destroy them, securing the property of the corporation to the use of those for whom it was purchased. 3 Kent's Com., 358; People v. Wren, 4 Scam., 269; Coles v. Madison Co., Breese, 120. The municipal corporation is the mere creature of the law. The town itself, in its material constituents, is the result of the voluntary act of the inhabitants. Where there is a town or city de facto, there can be no question of the power of the legislature to provide for it a local government, and to authorize local taxation for its support. The greater burden of taxation is compensated for in the greater advantages conferred by the municipal government. The consent of every individual to the authority of the local government is not deemed requisite, in order to subject him or his property to its jurisdiction, or is implied in the fact of his placing himself in a condition to require such local government.

If the legislature, independent of the question of taxation, may rightfully impose the authority of a local government on persons, who, by building in close proximity, have made a town *de facto*, it would seem hardly reasonable that the expense of such government should be borne by the county and state; and as little reason, we think, can exist why the legislature may not require the local population to support by local taxation, the government provided for it.

All taxation may be said to involve the taking of private property for public use; and yet all property is held subject to the right of taxation by the legislature, or under its authority, either for general purposes, or in local subdivisions for local purposes. It has even been held that the legislature may, by general enactment, tax any given species of property, either private or corporate, to the value of the property itself, for that the power of taxation, whenever conceded to the legislature over any given subject, implies the power even

of destruction. Armington v. The Town of Barnet, &c., 15 Vermt., 745; McCulloch v. Maryland, 4 Wheaton, 416.

Legitimate taxation, whether under the state or the municipal authority, is not the taking of private property for public use, without compensation, within the meaning of the constitution. The protection afforded to the citizen by the government, is usually conceded to be the just compensation referred to by the constitution, for all private property he is required to surrender to the public use in the shape of taxes. And it is only where an undue proportion of the burden of taxation is laid upon him, or when the power of local taxation is made to operate upon those, who, being out of the reach of the local benefits, ought not to be subject to the local tax, that there can be any plausible ground for alleging that property, taken for taxes authorized by law, is taken without just compensation.

The question where the proper line is to be drawn, between the legitimate exercise of the taxing power and an arbitrary appropriation of the property of an individual under the mask of this power, is discussed at length by Marshall C. J., in *Cheuney v. Hooser*, 9 B. Monroe, 330; and it is held by the court, that where there is no other constitutional restriction upon the power of taxation, securing equality and uniformity in the distribution of taxation, either general or local, the provision of the constitution which prohibits the taking of private property for public use without just compensation, furnishes the only available safeguard against legislation, which, in its operation, may result in the appropriation of the property of one for the benefit of many.

Conceding to the general assembly a wide range of discretion as to the objects of taxation, the kind of property to be made liable, and the extent of territory within which the local tax may operate, it is argued, in the opinion referred to, that there must be some limit to this legislative discretion; which, in the absence of any other criterion, is held to consist in the discrimination to be made, between what may reasonably be deemed a tax, for which a just compensation

is provided in the objects to which it is to be devoted, and that which is palpably not a tax, but which, under the form of a tax, is the taking of private property for public use, without just compensation.

If there be such a flagrant and palpable departure from equity, in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised—whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not.

It is urged by the plaintiff, that his farm, which is sought to be brought within the jurisdiction of the city, is agricultural land; that it is one mile from the old boundary of the city, and the same distance from any lands laid out into city lots, or used or needed for city purposes; that he can derive no benefit from the extension of the municipal government over him and his property; and that the act subjecting him to taxation at the will of the city council, and for its benefit, is an appropriation of his private property for the use of the city, without any compensation or benefit accruing to him in return.

We have no doubt, as is held in *Cheaney* v. *Hooser*, supra, that if the owner of land adjoining a city or town, should lay the same off into lots, and invite purchasers and settlers to occupy it with dwellings, or otherwise, he could not object to a law extending the authority of the local government over him and his land so laid out and occupied. But if the case is that of vacant land, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement

of the city limits, such an act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to the city, to tax the land to a certain distance outside of its limits; and is, in effect, the taking of private property without compensation. The force and effect, and obvious intent of the act is, to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government, furnishes no legitimate basis for the act.

In Wells v. City of Weston, 22 Missouri, 385, the supreme court of Missouri, while conceding to the legislature the uncontrolled power of taxation, subject only to the constitutional restriction, that "all property subject to taxation, shall be taxed in proportion to its value;" and conceding, also, the right to delegate to subordinate agencies, such as municipal corporations, the power of taxation, have denied to it, the power to tax arbitrarily the property of one citizen and give it to another; and on this ground have held, that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, land lying beyond the corporation limits.

And so it is held by the court of appeals of Kentucky, in conformity with the principles laid down in *Cheaney* v. *Hooser*, supra, that although the legislature has power to extend the limits of cities and towns, and include adjacent agricultural lands, without the consent of the owner, yet the corporation authorities cannot tax such property as town property, and subject it to the city burdens, without the consent of the owner, until it shall be laid off into lots and used as town property. The decision is made distinctly on the ground that the act of the legislature was an invasion of private property, contrary to the principles of our constitutional law, under color of the power of taxation. City of Covington v. Southgate, 15 B. Monroe, 491.

In the framework and operation of our government, says Mr. Sedowick, the protection of vested rights, is the great

Morford v. Unger.

practical object sought to be obtained. The legislative power being the most formidable, our system chiefly aims to guard the citizen against the legislature—to protect him against the power of a majority, taking the shape of an un-The unjust action of government with us, is most likely to take the shape of attacks upon rights of property. All government, indeed, resolves itself into the protection of life, liberty and property. Life and liberty, in our fortunate condition, are, however, little likely to be injuriously affected by the action of the body politic. Property is very differently situated. It is, therefore, of the highest moment, if possible, to obtain a clear idea of the nature and extent of the protection which guards our rights of property from attack, under color of law-to determine, in other words, what is a vested right. * tions connected with taxation are every day becoming of more and more pressing importance. The taxing authority is, after all, but one arm of that tremendous power of eminent domain, at the foot of which, so far as uncontrolled, every citizen lies prostrate; and the consequences of the earlier decisions, leaving this engine in the hands of unrestrained legislative authority, seems to have awakened that conservative jealousy of power, which never lies long dormant in the breast of our people. Certain it is, that the more recent constitutions, and the more recent judicial decisions, show a disposition not to abandon the taxing power to the often ill-regulated and despotic will of our fluctuating and hasty legislation. Sedgwick on State and Constitutional Law, 673.

The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but strictly there

Morford v. Unger.

are limits beyond which the legislative discretion cannot go. It is not every case of injustice or oppression which may be reached; and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of laws imposing taxes, or defining the boundaries of local The extension of the limits of the local auinrisdictions. thority, may in some cases be greater than is necessary to include the adjacent population, or territory laid out into city lots, without a case being presented, in which the courts would be called upon to apply a nice or exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property, without such compensation in return as the tax-payer is at liberty to consider a fair equivalent for the tax.

In the case of City of Covington v. Southgate, 15 B. Monroe, 498, it was held by the court, that as Southgate had made no town upon his land, and desired none; and as there appeared no legitimate necessity to justify the extension of the city boundary, without his consent, it presented a case of taxation for the benefit of others, and was under the color of taxation, an appropriation of private property without compensation.

We think the case made by the present plaintiff, is quite as strong as the one cited. His land is situated too far from the city of Muscatine, to be deemed, in any just sense, a part of it. He does not desire to lay it off into city lots, but desires to use it as farming land. It is idle to say that the protection afforded by the city authority, or the privilege of voting at the city elections, furnishes a just equivalent for the burdens imposed upon him in the shape of taxes, by the city; and the attempt to extend its jurisdiction over him and his property, must be regarded as an attempt to take private property for public use, and within the prohibitory clause of the constitution.

The restriction in the fifth section of the act, "that the lands lying within the territory brought into the city, not laid out into lots and out-lots, shall not be assessed or

taxed otherwise than by the acre, according to its value for agricultural, horticultural, mining, and other purposes," does not relieve the act of its objectionable features, or strengthen, in any degree, the case of the defendant. would seem to indicate, on the other hand, that the city was seeking to bring within its power, for the purpose of taxation, land used for farming purposes, and not needed for city lots, without any expectation of rendering a just equivalent for the burdens it designed to impose. ty is in no manner obviated by the suggestion, that the city only proposes to tax the land of the plaintiff by the acre, as agricultural lands, and not as city lots. It can make little difference to the plaintiff, in what manner his property is taxed. Whether as city lots, or by the acre, as agricul-It is the power to tax in any shape to which he objects. It might as well be attempted to call the tax itself, by some less objectionable name.

Judgment reversed.

Burrows et al. v. Lehndorff.

In an action commenced by attachment, it is not error to strike from the files, so much of the answer as takes issue upon the causes alleged in the petition for the writ of attachment.

Where a party in a state of insolvency, or in contemplation of insolvency, on his own motion, executes to certain creditors, at the same time, without consultation with them, several mortgages and deeds of trust, of all his property not exempt from execution—each instrument covering the same property, and reciting that it is subject to the prior conveyance—and causes the same to be filed for record on the same day, five minutes time intervening between the filing of each, the transaction constitutes, in legal effect, a general assignment, and not being made for the benefit of all the creditors alike, without any preference of one over another, is void.

The execution of a chattel mortgage by a debtor to a creditor, upon property which is subject to prior liens of the same kind, if done by the debtor, without the knowledge or request of the creditor, and if not ac-

cepted by him, is not such a giving of property in payment or security of the debt, as the law requires, in order to preclude an attachment.

A debtor may secure one creditor in preference to another; but if he undertakes to dispose of all his property to his creditors, at one and the same time, he must do it in such a way, as to place all his creditors upon an equality, giving them all his property to be divided between them, in proportion to their respective demands.

Where a debtor undertakes to dispose of all his property for the benefit of his creditors, giving a preference, he being insolvent, or in contemplation of insolvency, the fact that he has failed to appoint a trustee, as contemplated by law, will not render the assignment valid, as against creditors objecting to it.

Where the plaintiff, in a suit commenced by attachment, in all respects complies with the law, the presumption is that the attachment was rightfully sued out; and in an action on the attachment bond, if the party against whom the writ issued, claims that it was wrongfully issued, the burden of proof is upon him to establish that fact, by the proof of such facts and circumstances as tend to establish the truth of what he asserts

Appeal from the Scott District Court.

THURSDAY, APRIL 7.

At the time of commencing their action, plaintiffs sued out an attachment. The answer admits the correctness of plaintiffs' claim; denies so much of the petition as states the grounds for an attachment; sets up that the attachment was wrongfully sued out; and by way of set-off, claims damages for such wrongful act.

On plaintiffs' motion, so much of the answer as took issue upon the cause stated in the petition for an attachment, was stricken out. A replication was filed, denying the set-off; a trial had, and verdict for plaintiffs upon that issue, as also for the amount of their claim.

On the trial, it was shown that defendant, on the 16th and 17th days of January, 1857, made five chattel mortgages to secure several creditors, as follows, and for the following amounts: On the 16th, to Burrill Bros., for \$1,230-10; to Evans, Chew & Co., for \$403 46; to Burrows, Pret-

Vol. VIII.-13

tyman & Dalzell, for \$319 25, (covering the sum sued for); on the 17th, to J. A. LeClaire, for \$696 53, and to Butz & Schaffer et al. for \$1,037 70. And on the day last named, a deed of trust to one Sylvester, to secure several other creditors therein named, to the amount of \$1,235. These instruments were made in the order stated, covered the same goods and chattels, and each recited that it was subject to those preceding. The deed of trust, in addition to the goods and chattels named, covered certain parcels of real estate. The first one was filed for record, January 17, 1857, at five o'clock and fifty minutes; the second, five minutes later, and so on in the same order, five minutes intervening between each, until all were filed.

The plaintiffs were notified on the day after its date, of the execution of said mortgage by defendant's attorney. The attachment was issued on the 28th of the same month. On that day, and previous to the commencement of the action, plaintiffs demanded payment, or the security of their claim, which was refused. The attachment was levied upon the same goods covered by the mortgages and deeds of trust.

The mortgages and deeds, included all of the goods and merchandize owned by defendant in a store-house, occupied by him. The testimony leaves it very uncertain, whether all of his property was included in said instruments—the preponderance, however, favors the conclusion that all was included. Whether he had other creditors, is not shown conclusively, but probably none but what were otherwise secured. Based upon these, and perhaps other facts, certain instructions were given, to which defendant excepted, and now assigns the giving of the same for error.

Corbin & Dow, for the appellant, cited Burrill on Assignments, 31 to 35, and cases there cited.

Davison & True, for the appellees. relied upon Bebb v. Preston, Garnishee, 3 Iowa, 326; Code, sec. 977; Ford &

Rockwood v. Williams, 3 Kernan, 577; Wood et al. v. Lwry & Douglass, 17 Wend., 492; Bowen v. Clark et al., 5 Am. Law Reg., 206; Jordan v. Turner, 3 Blackf., 309; 5 Hammond, 97; 10 Johns., 451; Sackett, Belcher & Co. v. Partridge & Cook, 4 Iowa, 416.

WRIGHT, C. J.—The defendant could not claim a trial in this action, of the truth of the matters alleged as the cause for the attachment. There was no error, therefore, in striking so much of the answer, as sought to make this issue, from the files. Sackett, Belcher & Co. v. Partridge & Cook, 4 Iowa, 416; Bowen et al. v. Gilkison et al., 7 Ib., 503. This remedy is upon the bond.

No question arises as to the claim of plaintiff, for that is admitted. The instructions given and objected to, relate to the set-off, and particularly to the effect of the chattel mortgage.

The affidavit, as a cause for the attachment, sets up that defendant had, all the time, goods, chattels, &c., not exempt from execution, which he refused to give, either in security or payment of plaintiffs' debt- the affidavit being such as is required by chapter 84 of laws of 1853, 143. The defendant, in his answer, sets up the chattel mortgage made on the 16th of January, and says that he had secured plaintiffs in their debt. He also says that the attachment was wrongfully sued out; and, in determining this, two questions seem to have been made. First. Whether said mortgage was not security; and, Second. Whether defendant had property which he could give in payment or security. It is to these questions that the instructions principally relate.

The instructions objected to may be condensed as follows: That defendant, having admitted the justice and correctness of plaintiffs' claim, and plaintiffs having made a proper allegation in their petition, sworn to the same, and filed their bond, the law presumes that the attachment was rightfully sued out; that this presumption the defendant must

reverse; that, if he failed in this, his cross-action must fail; that, if at the time plaintiffs demanded security or payment, defendant had no property to turn out, the attachment was wrongfully issued; that whether he had such property, would depend somewhat upon the construction to be given to the transaction of the defendant, in executing the mortgages and deed of trust; that the execution of a chattel mortgage by defendant to plaintiffs, upon property which was subject to prior liens of the same kind, if done by defendant, without the knowledge or request of plaintiffs, and if not accepted by them, is not such giving of property in payment or security as the law requires, in order to avoid an attachment: that if the instruments offered in evidence were executed at the same time, and constituted one transaction—were made by defendant on his own motion, and he was, at the time, insolvent—and by these instruments he conveyed all his property (which was) not exempt from execution, then such conveyances would, in law, be equivalent to an assignment, and not being made for the benefit of all his creditors alike, without any preference to one over another, would be void; that, if void, defendant could have given the property in payment or security; and that defendant might secure one creditor in preference to another; but if he undertook to dispose of all his property to his creditors, at one and the same time, he must do it in such a way as to place all his creditors upon an equality, giving them all his property to be divided between them, in proportion to their respective demands. And finally, the jury were told to inquire:

First. Were these instruments executed at the same time?

Second. In making them, did defendant consult his creditors?

Third. Was he insolvent at the time, and did he, by these instruments, convey all his property?

Fourth. Was one creditor, by such instruments, preferred to another?

SUPREME COURT CASES-1859.

Burrows et al. v. Lehndorff.

Fifth. If these questions were answered in the affirmative, they would disregard the mortgage to plaintiffs, unless they found that they consented and agreed to such an arrangement.

The Code provides that no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims. Code, section 977. But for this provision, any debtor might make a general or partial assignment to a trustee, for the benefit of his creditors, with preferences—the said assignment being valid as against the process of such creditors, from the time of the execution of the deed, subject, of course, to any liens upon the property assigned. Brashear v. West et al., 7 Pet., 609; Wilkes v. Ferris, 5 Johns., 335; Cross v. Bryant, 2 Schm., 37; Hall v. Dennison, 17 Vermt., 311; Pearson v. Rockhill, 4 B. Mon., 296; Bebb v. Preston, 1 Iowa, 460; Coroles & Co. v. Ricketts, 1 Ib., 582.

The primary question, and the one upon which the case turns, is, whether the transaction developed by the testimony, was a general assignment; for, if it was, it is not claimed to be valid. Whereas, if it was a sale or mortgage of a portion of defendant's property, made with the bona file intention of securing one or more creditors in preference to others, it is not claimed to be per se invalid.

It seems to us that the questions of fact, upon which the character of the transaction was to be determined, were properly and fairly submitted to the jury for their determination, and that the conclusions of law, based upon a supposed state of facts, were correctly stated. Was the defendant insolvent? Did he make the instrument upon his own motion, and without consulting his creditors? Were they made at the same time, constituting one transaction? Was one creditor preferred over another? Did he convey all his property? These questions being answered in the affirmative, then they were to disregard the mortgage, and

properly so, for the transaction would then amount, in legal effect, to a general assignment, and would be void as against plaintiffs. The jury, by their verdict, have responded to these inquiries in the affirmative, and with their finding we have no disposition to interfere.

Upon two of the inquiries, alone, can there be any room for doubt, as to the correctness of their finding. relates to its being made without consultation with his creditors. We do not stop to inquire whether it would change the case, though he did consult some of his creditors, plaintiffs not being of the number, nor consenting to the arrangement. Without discussing that question, we may say that there is no reason for concluding, from the testimony, that he executed the instrument otherwise than upon his own motion. It is clearly proven that plaintiffs knew nothing of the mortgage to them, until the day after it was executed. It also appears that some of the other creditors, as well as plaintiffs, procured attachments and levied upon the same goods and merchandize, within a short time after the execution of the mortgages—a course entirely inconsistent with the supposition that they consented to the security given. Not only so, but it is very remarkable, if the creditors consented to the arrangement, that just five minutes should have intervened between the recording of each mortgage, neither more nor less. was in pursuance of an agreement mutually entered into between the creditors, it could have been so easily proved, that the failure to do so almost justifies the conclusion, that defendant presented them for record in the order preferred by himself, and not as agreed upon by the creditors. der all these circumstances, we think that the jury were fully justified in finding that the creditors had no knowledge of the transaction.

The second inquiry relates to the question whether these instruments were all made at the same time, constituting one transaction. It is said that it is impossible that they could all have been made at the same time. This is true,

so far as it is intended to assert the proposition, that they could not all be made at the same instant of time. But this is not what is meant. The true meaning and intention of the court, and as it must have been understood by the jury, is well and sufficiently shown by the use of the other words—did it constitute one transaction? And of this there can be no reasonable doubt. Here were six ininstruments, covering some fifteen to twenty pages of paper, all acknowledged before the same officer; each one referring to those preceding; and all of them filed for record on the same day, within the same hour, and almost, indeed, at the same minute; and presented for record, too, as we hold the jury might well conclude, by the defendant. How could the jury doubt, under such circumstances, as to defendant's intention? To make it one transaction, it was not necessary that all of the creditors should have been provided for in the same instruments, for the intention of the defendant to make a general assignment, and at the same time prefer his creditors, contrary to the express prohibition of the statute, could as well be accomplished by executing separate instruments, as by executing one.

We have before stated, that these are the only questions of fact upon which there could be any doubt as to the correctness of the finding of the jury. The question whether one creditor was preferred over another, was more legitimately for the determination of the court than the jury, from a construction of the instruments themselves. It is a proposition so plain in itself, however, that no prejudice could possibly result from thus submitting it, at least, to defendant. Had the jury found otherwise than affirmatively upon it, it would have been most manifestly erroneous.

It may be suggested, that all of the instruments, except the last, were mortgages; that no trustee is named; and, therefore, the transaction could not have been intended as a general assignment, and that it should not, for this reason, be so construed. To this, it may be replied, that each

one of the five instruments, (called mortgages in the record), constitute the creditor named and secured therein, a trustee for the purpose of taking possession of the property named, upon certain conditions, and selling the same for the purpose of paying the debt named, subject always to the right conferred upon other creditors, by the prior instruments. Now, it is true, that the general assignment referred to in the Code, does imply the intervention of a trustee; but if a debtor shall undertake to dispose of all of his property for the benefit of his creditors, giving a preference, he being insolvent, or in contemplation of insolvency, it would not be rendered valid as against the creditors objecting to it, by the fact that he had failed to name and appoint a trustee, as contemplated by the law. And it is believed that what is said upon this subject, in the case of Cowles & Co. v. Ricketts, 1 Iowa, 582, will not be found to conflict with this position. The true inquiry is—the essential and important issues are—was defendant, at the time of the transfer, insolvent, or did he contemplate insolvency? Did he make a general transfer for the benefit of his And if so, ther was it made for the benefit of all in proportion to the amount of their respective claims? If not, it is invalid. The fact that he appoints a trustee. seems, perhaps in most instances, to fix conclusively the character of the transaction as a general assignment. If, however, he shall do that which is prohibited by the law, in another manner, the rights of creditors are not changed.

These general remarks sufficiently dispose of the case, and lead to the conclusion that this judgment must be affirmed. Some of the instructions, taken alone, and without reference to the facts of the case, as developed by the testimony, may be subject to objection. It is never correct, however, to thus consider them. They must all be viewed together, and in connection with the case made by the record. Thus viewed, without examining them in detail, we find nothing in them, of which defendant has reason to complain.

The position of defendant, that the instructions improperly place the burthen of proof upon him, to show that the attachment was wrongfully sued out, is untenable. In the first place, it is one of no practical importance in this case, for it is shown affirmatively, that plaintiffs did demand payment or security of their debt, before suing out their attachment, which was refused. And they thus showed affirmatively, that they had complied with the law. Upon the other part of the issue, that defendant had no property to give, so far as the argument drawn from the hardship of the case is concerned, there is really no more difficulty in requiring the proof to come from one party than another.

But then, we understand the rule to be, that if plaintiffs made the affidavit, filed the bond, and in all respects complied with the law in procuring their attachment, the presumption is, that it was rightfully sued out; and if defendant claims that it was wrongfully issued, the burden of proof is upon him to establish that fact. Not that he must necessarily do it by positive testimony—as, for instance, by proving positively that plaintiffs did not demand payment or security, or that he did not refuse to pay or secure, or that he did not have property; but it may be shown by the proof of such facts and circumstances as tend to establish the truth of what he asserts. The case is not different from ordinary ones in practice, and the same rules of evidence apply.

Whether it is proper to allow the party sued, to off-set the damages sustained by him, by reason of the wrongful suing out of the attachment, in the trial of the principal cause, seems not to have been made a question in the court below, or here. We dispose of the case, therefore, upon the points made, without intimating an opinion as to the right to thus litigate the question of damages.

Judgment affirmed.

Vor., VIII.-14

Pixler v. Nichols.

8 106 79 44 8 106 82 270 8 106 87 551 8 106 8 103 101 638 8 106 106 373

PIXLER v. NICHOLS.

Where one party hires himself to another for a given period of time, and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of the services performed, as upon a quantum meruit, without showing that he performed his entire contract, or that he left the service of his employer, for good cause.

But in such a case, where the contract is broken by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to set up in defense, the breach of the contract, for the purpose of reducing the damages, or showing that nothing is due, and to deduct what it will reasonably cost to procure a completion of the whole service, as well as any damages sustained by reason of a non-fulfilment of the contract.

And in such a case, if it is found that the damages are equal to, or greater than, the value of the services rendered, and that the employer, having a right to the performance of the whole contract, has not received any beneficial service, the employed is not entitled to recover.

Where in an action to recover for work done and performed, it appeared that the plaintiff was hired by the defendant, to labor for him for the term of six months, and that he left the service of the defendant at the expiration of four months, and thereupon the court was asked to instruct the jury as follows: "1. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he has no claim upon the defendant for the services rendered. 2. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he cannot recover anything for his services, although the defendant had paid plaintiff a part of his wages, during the continuance of the service"—which instructions the court refused to give; Held, That the instructions were properly refused.

Appeal from the Clayton District Court.

THURSDAY, APRIL 7.

The plaintiff sued the defendant, before a justice of the peace, for sixty-four dollars, for work done and performed for defendant, at his instance and request. The defendant denied owing the plaintiff anything, and pleaded a set-off of

Pixler v. Nichols.

seven dollars, for cash paid to plaintiff. On the trial before the justice, judgment was rendered for the defendant. On appeal to the district court, the testimony was that the plaintiff was hired by the defendant to labor for him for the term of six months, and left the service of the defendant at the expiration of four months.

The court was asked by the defendant to charge the jury, that: 1. If the plaintiff hired to the defendant for the term of six months, and left the service of defendant, without cause, before the expiration of the time, he has no claim upon the defendant for the services rendered. 2. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he cannot recover anything for his services, although the defendant had paid plaintiff a part of his wages, during the continuance of the service. The court refused so to charge the jury, and a verdict was returned for the plaintiff for \$57, for which judgment was rendered. The defendant appeals.

Williams & Peck and J. O. Crosby, for the appellant, cited 1 Parsons on Contracts, 522, and cases there cited.

Noble & Drummond, for the appellee, relied upon Britton v. Turner, 6 New Hamp., 497; Epperly v. Bailey, 3 Ind., 73; Pierson v. McKibben, 5 Ib., 262; Coe v. Smith, 4 Ib., 79; Eyser v. Weisgerber, 2 Iowa, 463; Champlin v. Rowley, 18 Wend., 187; Davis v. Fish, 1 G. Greene, 406.

STOCKTON, J.—We think the instructions were rightfully refused. If the parties had expressly agreed, that if the plaintiff left the service of the defendant, before the expiration of the time limited, nothing was to be considered as carned by him, there could be no doubt that the plaintiff could not recover. But where all that is shown is, that upon an agreement to labor for six months, the plaintiff labors four months, and refuses to labor any longer, and sues for the value of the labor performed, we think he is entitled to re-

cover, as upon a quantum meruit; and need not, as a condition precedent, first show that he had performed his entire contract, or that he left the service of his employer upon good cause.

We are satisfied with the rule established in Britton v. Turner, 6 N. H. 481, giving its full weight, for the protection of the employer in such cases, to the qualifying rule, that where the contract is broken by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to put the breach of contract in defense, for the purpose of reducing the damages, or showing that nothing is due, and to deduct what it will reasonably cost to secure a completion of the whole service, as well as any damage sustained by reason of the non-ful-filment of the contract. If, in such case, it is found that the damages are equal to, or greater than, the value of the labor performed, and that the employer, having a right to the performance of the whole contract, has not received any beneficial service, the plaintiff is not entitled to recover.

Judgment affirmed.

WILLIAMS v. DONALDSON.



Where in an action on a promissory note, given in part payment for a reaper, in which the defendant claimed a set-off, for money paid on said reaper, at the time of its delivery, and for freight and charges paid upon the same, it appeared that the contract for the sale of the reaper, was as follows: That it was to be delivered at D., to the care of B. & P., on or before the 1st of July, 1855; that defendant, at the time of the delivery, was to pay \$50,00, and the freight and charges, and \$110,00 on the 1st of March, 1856; that the reaper was warranted to be of good materials—to be well made—not liable to get out of order, with careful usage—and to be capable, with one man and a good team, of cutting and raking off, and laying in gavels, for binding, from twelve to twenty acres of grain per day; that the machine was to be tried at the next harvest; and that if it did not perform as warranted, the defendant was to store and safely deliver it to G., H. & Co., the manufacturers, or their agent, &c.; and where it further appeared that the reap-

er remained in the possession of the defendant, and had never been returned or delivered to G., H. & Co., or their agent; and where the jury rendered a verdict for the defendant, for the amount of his set-off, upon which judgment was rendered; *Held*, 1. That the defendant could not keep the reaper, and at the same time recover the amount paid; 2. That the verdict was erroneous.

Where in an action on a promissory note, given in part payment for a reaper, in which the defendant claimed a set-off, on the ground of a breach of the warranty under which the reaper was sold, a witness for the defendant, on cross-examination, testified that after the reaper was delivered, defendant told him he was going over the river to Rock Island, to get some castings for the reaper, and thereupon the defendant proposed to prove by the witness, what he told him subsequently, and in another conversation, about the working of the reaper, with the castings thus obtained, which evidence was admitted; Held, That the evidence was not admissible under section 2399 of the Code.

Parol evidence is admissible to show that a written contract is void for fraud, or the like, or that it never had any legal existence or binding force; and such evidence does not infringe upon the rule, that parol evidenceis not admissible to contradict, vary, or add to, a written instrument.

Appeal from the Scott District Court.

THURSDAY, APRIL 7.

This action was brought upon a promissory note. The answer admits the execution of the note, but says it was given in part payment for a reaper sold him by plaintiff's agent; that said reaper was warranted to perform in a certain manner, (which the pleader sets out), and avers a breach, and an offer to return. It is also averred that the machine was wholly worthless and unfit for use; that defendant refused to execute the note, and would not, but for certain representations made by plaintiff; that they were calculated to deceive, and did deceive, said defendant; that they never had been performed; and that defendant was thereby defrauded, &c. He also pleads a set-off. The replication takes issue upon all the matters in defense, set up in the answer. Trial and verdict in favor of defendant, to the amount of his set-off. Motion for a new trial, and in

arrest of judgment, overruled, and judgment on the verdict. Plaintiff appeals. The other material facts are sufficiently stated in the opinion of the court.

James Grant, for the appellant.

Cook, Dillon & Lindley, for the appellee.

WRIGHT, C. J.—The contract for the sale of the reaper, is contained in a written or printed order, signed by defendant, directed to plaintiff or his agent-the material parts of which are as follows: It was to be delivered at Davenport, to the care of Burrows & Prettyman, on or before the first of July, 1855; defendant was to pay freight and charges; \$50 at the time of delivery, and \$110 on the first of March, 1856. Said machine was warranted to be of good materials-to be well made-not liable to get out of order, under careful usage—and to be capable, with one man and a good team, of cutting and raking off, and laying gavels for binding, from twelve to twenty acres of grain a The machine was to be tried at the next harvest, (that of 1855), and if it did not perform as warranted, the defendant was to store and safely deliver it to Ganson, Huntly & Co., or their agent, (subject to refunding the fifty dollars paid.) If it did perform as warranted, defendant was, when called upon by G., H. & Co., or their agent, to execute his note for \$110, with interest, payable on the first of March, 1856. The note for the \$110 was executed on the 20th of July, 1855, and is the one sued on in this case. Defendant pleads as a set-off, the fifty dollars paid at the time of the delivery of the machine, and the freight and charges advanced, and for this amount recovered judgment.

This much of the verdict and judgment was most clearly erroneous. There was no testimony tending to show, or from which the jury could possibly have inferred, that the machine had been returned, or delivered to the persons named in the contract, or their agent. On the contrary, it

is a fact indubitably established, that the machine, at the time of the trial, still remained in the possession of the de-The only offer he ever made to return was to fendant. Burrows & Prettyman. They, at the time, denied being agents for Ganson, Huntly & Co.; and there is nothing to show that they were. So far as the order itself tends to place them in the capacity of agents, they were acting as much for defendant, as his warehouseman, as for the other party. Under these circumstances, he had no right to recover the money paid. 'He could not keep the machine, and at the same time recover the amount paid. er this, his contract required that he should within a reasonable time, deliver the machine to Ganson, Huntly & Co., or their agent. An offer to deliver, and refusal to receive, would, of course, excuse him, and authorize a recovery. But the delivery or offer must have been made to some one authorized to receive it. Of this there was no proof whatever, and so much of the judgment, at least, must be reversed.

A witness for defendant, on cross examination, testified, that after the machine was delivered, defendant told him he was going over to Rock Island to get some castings for the reaper. Defendant then propose to prove by the witness, what he had told him subsequent to this, and in another conversation, about the working of the machine with the castings thus obtained. Plaintiff objected to this second conversation; the objection was overruled, and the witness proceeded to detail the same, to which plaintiff excepted.

This was error. The law is, that when part of a declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other—as when a letter is read, all other letters on the same subject, between the same parties, may be given. When a detached declaration, conversation, or writing, is given in evidence, any other declaration or writing, which

is necessary to make it fully understood, or explain the same, may also be given in evidence. Code, section 2399.

The first part of this provision refers evidently to giving all of a conversation on the same subject in evidence, where a part has been elicited by one party—such conversation being entire, and not made up of detached parts. Thus, if a witness shall detail, in answer to plaintiff's interrogatories, what a defendant told him as to the claim made against him in the plaintiff's action, defendant has a right, on cross-examination, to inquire into what else he said at the same time, upon that subject. The second part of the section relates to detached declarations or conversations; and in order to give any other than that one first introduced, in evidence, that proposed must be necessary to make the first fully understood, or to explain it.

The testimony in this case was admitted, we suppose, under the second clause. It could not have been under the first, for there is no pretense for the position that the second was a part of the first conversation. The parties had separated—the conversation had closed—and sometime afterward, defendant told him him about the working of the machine. Was the second conversation necessary, then, to explain or make fully understood, the first? not, in any fair sense. What was the fact detailed in the first instance? Nothing more than that defendant was going to Rock Island for castings for his reaper. ing, or non-working of the machine, was not the subject of To prove, then, that the defendant afterconversation. wards said that his machine did not work with these castings-did not explain, or make more fully understood, what was first said. What he said in the first conversation was just as fully understood when it was closed, as it was from any supposed explanation derived from the second. Dougherty v. Posegate, 3 Iowa, 88.

The order for the machine was given in May, 1855, and it was received in time for the harvest of that year. During that harvest, and while the defendant was using the

reaper, he was applied to for the note. The person applying was the agent for the payee, who was one of the pa-Ganson, Huntly & Co., were the manufacturers. Several days elapsed after the agent first visited the defendant, before the note was given. He called two or three times; several trials were made with the machine under his supervision; and some changes or repairs were made by him, or at his suggestion. Defendant complained of the working of the reaper; that it did not answer, and some representations were made by the agent, as to its future working and usefulness. They talked about giving the note, and one witness says that the agent told defendant that he would make the machine work, and defendant said if he did, he would take it-that he did not mean to give a note and pay it, if the machine did not work. The agent said that there would be no difficulty about that, and witness understood that if the machine did not work, the note was not to be paid. Other testimony bearing upon the same subject was introduced. Testimony was also introduced to show that the machine did not work well, both before and after the note was given; and during the harvest of 1855, as well as that of 1856. To all such evidence plaintiff objected, upon the ground that it varied the written contract. The objection was overruled, and he excepted. Instructions were asked by him upon the same subject, which were refused, and others given, to which he excepted; and thus we have raised the third question in the case, and the one to which most of the argument has been directed.

There is no controversy as to the rule that parol evidence is not admissible to contradict, vary, or add to, a written instrument. This rule is not infringed, however, by another, which recognizes an exception just as well established, that it may be shown by parol, that the instrument is altogether void for fraud, or the like; or that it never had a legal existence, or binding force. Fraud is shown, not to vary, contradict, or add to, the writing, but to show, that Vol. VIII.—15

as between the parties, it never had any legal life or es-Bowman v. Torr, 3 Iowa, 571. Cases of fraud and mistake form exceptions to the general rule, which excludes parol evidence to control or vary the written contract; and though exceptions, they stand upon as sound policy as the rule itself. Ring v. Ashworth et al., 3 Iowa, 452. So, also, the want of consideration may be proved, to show that the agreement is not binding. 1 Greenl. Ev., section Neither is the rule infringed, by the admission of oral evidence, to prove a new and distinct agreement, upon a new consideration, whether it be as a substitute for the old, or in addition to, or beyond it. 1 Greenl. Ev., sec. And thus it will be found, that numerous exceptions exist which are well settled, but that they by no means impair the force or policy of the rule itself. None of these exceptions, however, justify the admission of testimony changing the time or manner of payment—as that a note on its face payable in money, was to be discharged in professional services. 5 Georgia, 373. Or that a note payable on demand, was not to be paid until after the maker's 3 Barn. & Ald., 233. Or a warranty as to equality not included in the written contract. 12 East, 11.

If the case before us falls under the rule last stated, then the testimony should have been rejected. This, however, is not our view of it. By the terms of the written order. the defendant was to give his note for the balance of the purchase money, if the reaper performed as warranted, and not otherwise. To determine whether it answered the warranty, the machine was to be tested at the harvest then approaching. During this harvest, the payee (or what is the same thing, his agent), appears, and they have several conversations as to its working. It is evident that at this time the defendant was not satisfied with its operation. From the testimony the jury could legitimately infer, that he denied that it fulfilled the requirements of the contract -as, also, that it did not, in fact. Experiments were made, and the defendant, as the jury might fairly conclude, was

still dissatisfied; and during all this time the agent makes the representations detailed, as to the character of the reaper, and as to the effect of giving the note. Now, none of these representations amounted to any warranty not already included in the contract. They did not add to, vary, or contradict the written instrument. The giving of the note, unexplained, would be conclusive evidence that the machine answered the warranty—that it had been tried, and had been found in all respects such as was required by the contract. If it is shown, however, that defendant was induced to give the note before the trial had been sufficiently made; that there was no waiver thereby on his part, of his rights under the contract; and that notwithstanding the execution of the note, his liability was to be tested by the terms of the original contract, the showing of these facts, does not contradict the written agreement, nor violate any rule of evidence. Suppose the note had been given as soon as the machine was delivered, and before any trial had been made; and it was shown that the payee had induced the giving of it, by representing, in the very language of the written agreement, that if the machine did not perform as warranted, the note was to be returned, or was not to be paid; and it was also shown that it had been fairly tested, as required by the contract, and was worthless, could it be claimed that such evidence contradicted the writing. It seems to us not. And no more would it, if the same thing should take place before the trial was fully made.

We do not say that the testimony warranted the conclusion, that the note was obtained under the circumstances, claimed by defendant. We only hold that the testimony was not improperly received. Its effect was another thing, and as to that, we need say nothing at this time, as the case must be reversed on grounds heretofore noticed.

The views above expressed, indicate, perhaps sufficiently, our ideas upon the main question raised in the case. The instructions are very lengthy, and to take them up separately would unreasonably extend this opinion. In the

main, we have no hesitation in saying, that they state the law correctly. So far as they relate to the question of fraud, there is but little, if any, ground in the testimony, upon which to predicate them. We could not say, however, that they were so entirely inapplicable, as were those in the case of *Moffett* v. *Cresler*, *post*, 122, as to justify their refusal, if asked.

Judgment reversed.

8 116 115 894

CAIN v. DEVITT.

Where in a suit commenced before a justice of the peace, the original notice informed the defendant, that the plaintiff claimed of him a certain sum, as money due her for the labor of her son, A., and that the amount claimed, was justly due her as the balance of accounts for said labor of her son; *Held*, That the original notice sufficiently stated the plaintiff's cause of action; and that there was no error in permitting the plaintiff, in the absence of a bill of particulars, to give evidence under it, to show an indebtedness to her from defendant, for the work of her son, A.

Under the Code, the mother, as the natural guardian of the person of a minor son, where the father is dead, is entitled to recover for the services of the son.

Where in an action by a widow, to recover for the services of her minor son, the defendant asked the court to instruct the jury as follows: "That the mother, on the death of the father, is not entitled to recover for the earnings of her minor child, and cannot maintain an action therefor in her own name," which instruction the court refused to give; Held. That the instruction was properly refused.

Where there is nothing in the testimony in a cause, to justify the assumption on which instructions asked, are predicated, they may be properly refused.

Appeal from the Clinton District Court.

THURSDAY, APRIL 7.

This action was commenced by a widow, before a justice of the peace, to recover for the services of her minor son,

and taken by appeal to the district court. The original notice was served upon the defendant, and informed him that the plaintiff claimed of him \$65,50, as money due her for the labor of her son Anthony, and that the above amount was justly due her as the balance of accounts for said labor of her son. Judgment for the plaintiff, and defendant appeals. The other material facts are stated in the opinion of the court.

A. R. Cotton, for the appellant, upon the point that the mother could not recover for the earnings of her minor child, cited Pray v. Gorham, 31 Maine (3 Red.,) 240; Jenness v. Emerson, 15 New Hamp., 486; Commonwealth v. Murray, 4 Binney, 487; 2 Kent Com., 193; 1 Parsons on Cont., 256, 257 and note; 1 Black. Com., 453.

Cook, Dillon & Lindley, for the appellees.

The appellant, to establish the proposition that the mother has no legal right to recover for the service of her son, cites Pray v. Gorham, 31 Maine, 240. That case, as the court will see on examination, was decided with reference alone to certain sections of the statute of that state. He also cites Jenness v. Emerson, 15 N. H., 486. This case was decided on the ground that the child was emancipated by misfortune, the parent being a pauper, which admits that, otherwise, she would have the right to recover for the services of her child. The case of Commonwealth v. Murray, 4 Binney, 487, is also referred to. That case is decided with reference to the power of Congress to contract with a minor, so that even he cannot avoid the contract, And Breckenbidge, Justice, puts it somewhat on the particular circumstances of the case. The boy was sickly—could not work at his trade—going to sea was good for him; and, in such a case, says that Judge, Reference is also made to 1 Blackthe court will interpose. stone, 453. The remark there, in parenthesis, is but a loose expression, and evidently refers to the time when the father

and mother are both living. In Nightingale v. Withington, 15 Mass., 272, PARKER, Judge, says: "Generally, the father, and in case of his death, the mother, is entitled to the earnings of their minor children. See Benson v. Remington, 2 Mass., 113. In 16 Mass., 139, WILDE, Justice "The mother, after the death of the father, remains the head of the family. She has the like control over the minor children as he had when living." WOODBURY, Justice, in Gale v. Parrot, 1 N. II., 28, says: "The general right of parents to recover for the services of their minor children, cannot be contested." And the court say, in 4 N. H., 95: "By the common law, and independent of the statute, such children are entitled to, and have, a perfect right to support from their parents; and correlative to this duty, is the right of the parents to the services of their children, so long as they remain under their control." But, without going through the whole range of authority on this subject, we will call the attention of the court to a few sections of the Code of Iowa, to show, that in this state, the mother may recover for the services of her minor child, the father being dead. By sec. 1490, it is provided that when the minor has been paid for his services, "the parent or guardian cannot recover therefor a second time." It does not say, "the father or guardian." Can the guardian of the person of a minor sue for his services? The answer must be in the affirmative. If so, then the mother can sue, because she is a parent; and the guardian of the person has no more power and control over the person than the parent has. See section 1498 of the Code. That section does not say that the guardian has the same power and control that the father would have, but "that the parents would have, if living." See, also, sections 1491, 1492, 1493, 1494 of the Code, all of which show conclusively that the legislature intended that, the father being dead, the mother succeeded to all his rights and control over their minor children. In conclusion, we wish to refer the court to 2 Kent's Com., (6th ed.), 192. He says: "There can be no doubt that this right of the

father is perfect while the child is under the age of fourteen But as the father's guardianship by nature continues until the child has arrived to full age, and as he is entitled by statute to constitute a testamentary guardian of the person and estate of his children, until they are of the age of twenty-one, the inference would seem to be that he was, in contemplation of law, entitled to the custody of the persons, and to the value of the services and labor of his children during their minority." Now, this argument applies to the case at bar precisely, for, by section 1491, if the father dies, the mother becomes the guardian by nature. By section 1492. she may, by will, appoint a guardian; and by section 1494, she may appoint a guardian to take charge of the property of the minor. The remarks of Chancellor Kent, above quoted, are applicable to this case, in every particular, and conclusively establish our position, that in such case the mother may recover, under the Code of Iowa.

STOCKTON, J.--To insure a trial in the district court upon appeal, on the same cause of action that was tried before the justice, the law requires that the justice shall file in the office of the clerk of the district court, all the original papers relating to the suit, with a transcript of the entries on his docket. Because the bill of particulars was not Code, section 2336. marked "filed," by the justice, the defendant objected to the same being read to the jury, and the objection was sustained by the court. When the plaintiff then attempted to introduce evidence to prove an indebtedness to her from the defendant, the latter objected to any evidence being given to the jury, on the ground that there was no bill of particulars on file, nor anything in the record, to show on what cause of action the suit was brought. This objection was overruled, and we think rightly. The original notice sufficiently stated the plaintiff's cause of action, and there was no error in permitting the plaintiff, in the absence of a bill of particulars, to give evidence under it to show an indebtedness to her from defendant, for the work of her son, Anthony.

The more important question in the cause arises under the instructions of the court, as to the right of the mother to recover for the services of her minor son. The plaintiff is a widow, and brought this suit to recover for the work and labor of her son, under the age of twenty-one years. The testimony does not show that the son resided with the mother, or received his support and maintenance from her. It shows, however, sufficiently that the son, who was nineteen years of age at the time, was subject to the control of his mother, and obeyed her directions as to when, and with whom, he should labor. The court refused to charge the jury, as requested by defendant, that the mother, on the death of the father, is not entitled to recover for the earnings of her minor child, and cannot maintain an action therefor in her own name."

In the absence of statutory regulation, the right of the father to the earnings of his minor children results from his obligation to support them. The right and the obligation go together. The authorities are not uniform upon the question whether this right and obligation devolve upon the mother, at the father's death. The weight of authority would seem to indicate, that at common law, they do not. 1 Parson's Contracts, 259, note. By our statute, the father is made the natural guardian of the person of his minor child; in case of his death, the mother, unless in case of some disqualification, becomes such guardian. Code, sec. 1491, 1492.

Our laws makes the distinction of guardians of the person, and guardians of the property of minors. Where a minor has property not derived from the parents, the county court is required to appoint a guardian to manage said property. And such guardian is required to give bond and security to the approval of the court. The guardian of the person of the minor is not required to give such bond; and whether appointed by the will of the natural guardian, or, in the absence of such will, by the county court, such guardian has the same power and control over the person of the minor, that the parents would have, if living. Code, section 1498.

We think it results conclusively from these provisions of the Code, that the mother, as the natural guardian of the person of the minor son, where the father is dead, is entitled to recover for his services.

Exceptions may exist to this rule, but they are to be determined by the circumstances of each case. Where the son does not live with the mother, or where she does not exercise her right to control him, the son may be entitled to receive, himself, the wages of his laber; and the consent of the mother, in such case, may be inferred from slight circumstances. Gale v. Parrot, 1 N. H., 28. An agreement by the father, to relinquish to the child the right he would otherwise have to his services, and to receive his wages, may be inferred from the circumstances of his leaving him to manage his own affairs, and make and execute his own contracts, for a considerable time. Jenny v. Alden, 12 Mass., 375; Conover v. Cooper, 3 Barb., 115. There is nothing in this case, to indicate that it should not be governed by the general rule.

The objection made to a portion of the testimony, that it showed a partnership between the minor son and one Logan, in the work of "breaking prairie" for the defendant, we think, was properly overruled. The evidence does not necessarily prove any such partnership, and it is not, therefore, necessary for us to decide what would have been the plaintiff's rights in the premises, had such fact been shown.

We may say further, in conclusion, that some of the instructions asked by the defendant, and refused by the court, seem to us proper enough to have been given in a case where they were relevant to the facts proved. There is nothing, however, in the testimony to justify the defendant in the assumption on which the instructions asked and refused, are predicated—that the minor son was the real party in interest—that he contracted to do the work for the defendant on his own account—or that he was not living with his mother, and maintained by her, partly at least, from the proceeds of

Vol. VIII.-16

Motfitt v. Cressler.

his labor. The instructions asked, therefore, were properly refused.

Judgment affirmed.

MOFFITT v. CRESSLER.



There is no error in refusing to give an instruction asked for, however correct or applicable it may be, when the same instruction substantially, has been previously given by the court.

To bind a principal, by the representations of a third person, the agency of such third person, must be shown otherwise than by proof of his declarations.

To give an instruction upon a state of facts not proven, is calculated to mislead and confuse the jury, and is error.

An instruction to a jury, upon a mere abstract proposition of law, referring in no way to either the evidence or issues made, and which has not misled the jury, to the prejudice of the party complaining, will not warrant the granting of a new trial; but where the instruction has a tendency to make an erroncous impression upon the jury, and mislead them in their views of the case, a new trial should be granted.

Appeal from the Scott District Court.

THURSDAY, APRIL 7.

PLAINTIFF sues as the assignee of a promissory note, made to one John R. Moffit. The defendant admits the making of the note, but sets up that it was given for a threshing machine—that said machine was warranted—that the warranty, as well as the consideration, had failed—that the note was obtained by the fraud of the payee, who, in order to induce defendant to execute the same, made certain false and fraudulent representations, which were known to be false, and which were intended to, and did, deceive said defendant; and that said note was assigned after it became due, or was still the property of the payee. The replication denies all the new matter contained in the answer. Trial, and verdict for defendant; motion for a new trial overruled, and judgment on the verdict. Plaintiff appeals.

Moffitt v. Cressler.

James Grant, for the appellant.

Cook, Dillon & Lindley, for the appellee.

WRIGHT, C. J.—The bill of exceptions embodies all the testimony given to the jury, and from this it is pretty clearly shown, that the plaintiff took the note after it was due, and that he does not, therefore, stand in the position of an innocent holder. Indeed, we do not understand it to be claimed by the appellant, that he stands in any better attitude than would the payee, if suit had been brought in his name. We should, therefore, treat the case as if John R., instead of John N. Moffitt, was the plaintiff.

It seems that one Crary, as agent for Moffitt, sold defendant, in 1856, a machine, known as "Moffitt's Patent Improved Grain Separator," for from \$350 to \$400. Crary made some representations as to the character of the machine and its capacity, and warranted it to perform as represented. It was tried, and did not answer the purpose. was repaired frequently at the expense of plaintiff. was during the year 1855. On the 14th of June, 1856, defendant executed this note, which is for the sum of three hundred dollars. What was said at the time of its execution -what inducements were held out-what representations were made, there is nothing to show. On the same day, the payee gave defendant an order to Owen, Lane & Dyer, machinists, in Rock Island, Illinois, directing them to repair the thresher in the best manner, and charge to the account of the drawer. This order was presented, and O., L. & D. refused to make the repairs. Certain statements made by Crary, and O., L. & D., were objected to by the plaintiff, and the objection overruled.

The plaintiff asked the court to instruct the jury, that the agency of Crary must be proved by other evidence, than his sole declarations that he was such agent. The same instruc-

Moffitt v. Cre-sler.

tion was asked as to the declarations and statements of Owen, Lane & Dyer, and refused.

There was no error in refusing the instruction as to the statements of Crary, for the reason that it was given substantially in the same words, in the instructions in chief. The court was not bound to give it twice. As to the statements of O., L. & D., however, the record only shows that plaintiff's instruction upon that subject was refused. jury were left to conclude, therefore, that their declarations alone, would be sufficient to establish their agency. The instruction should have been given. bind the principal, by the representations of a third person, the agency of such third person must be shown, otherwise than by his declarations. He may prove his agency by his own oath, if the authority is conferred by parol, or it may be established in many ways, as by the declarations or admissions of the principal; but it cannot be by the declarations alone of the person assuming thus to act. This rule is well settled, and, indeed, is recognized by the court below as to the declarations of Crary, while it would seem to have been denied as to those of O., L. & D. 1 Greenl. Ev., secs. 116-17; 2 Ib., 63, and authorities there cited.

Several instructions were asked by the defendant, and given, upon the subject of false representations. One of these was as follows: "If after the defendant purchased this machine from Crary, the payee induced the defendant to give this note, by false and fraudulent representations with regard to the machine, or as to its qualities, this would entitle the defendant to a verdict." Other instructions embody substantially the same rule, but this will be sufficient for our purpose.

The objection to them all, as urged by the plaintiff, and we think correctly, is, that they are entirely inapplicable, there being no testimony tending to show, or from which the jury could possibly fairly infer, such false and fraudulent representations. No witness testified to a word said by

Moffitt v. Cressler.

the payee, or any agent of his, to induce defendant to execute the note. All of the testimony relates to the representations made preceding the sale of the machine. a year previous to the date of the note. After the thresher had been tried, we find only that a note was made for three hundred dollars. That it was even given for the machine, there is no positive proof. This, however, from the circucumstances, the jury might fairly conclude. They could not conclude, on the other hand, that the payee used fraud, or made false representations in obtaining it. To give an instruction upon a state of facts not proven, and espeically in a case of this character, is calculated to confuse and mislead a jury, and is error. McLain v. Eshane, 17 B. Monroe, 156; 5 Ohio St., 452. In U. S. v. Brentling, 20 How., 252, it is said, "the charge of the court, being founded upon a hypothetical state of facts of which there is no evidence, was erroneous."

If the instruction was upon a mere abstract proposition of law, referring in no way to either the evidence or the issue made, and it could not be fairly inferred that the jury was misled, to the plaintiff's prejudice, it would make no difference. But if the charge had a tendency to make an erroneous impression upon a jury, and mislead them in their views of the case, a new trial should be granted. McGregor et al. v. Armill, 2 Iowa, 30; Benham v. Casey, 11 Wend., 83.

In this, the instructions complained of, were pertinent under the issues made, but there were no facts sustaining them. Now, we can readily imagine how the jury might have been misled, by such instructions, to plaintiff's prejudice. The false representations proven, if any, related to the trade for the thresher. Under the instructions, the jury probably felt justified in connecting these with the giving of the note, and that the plaintiff induced its execution, by false and fraudulent representations. And yet nothing could be more unjust or unwarranted. The giving the note was prima facie, at least, a waiver of the fraud practiced at the time of the sale

Whipple v. Cass.

of the machine, if any, as well as of any claim under the alleged warranty. To prove that the previous supposed fraud was not waived thereby, it was the duty of the defendant to rebut the presumption thus arising, and to show fraud and false representations practiced and made then. Of this there was no scintilla of proof, and the instructions were, therefore, erroneous.

It is said, it is true, that the payee gave defendant on the same day, an order for the repair of the machine, and that this tends to show the means made use of to procure the note. It is far from showing, however, anything like fraud or misrepresentation. Upon its face, (and we know nothing about it beyond this), it is entirely consistent with the utmost fairness and the strictest integrity. If the repairs were not made, according to the directions of the order, then the jury might have been justified in deducting from the amount due on the note, the value of such repairs, if they believed that a part of the consideration of the note was, that this work was to be done. They could not, however, in the absence of all proof, find for defendant, because such repairs were not made.

Judgment reversed.

WHIPPLE v. CASS.

Where a suit is commenced by attachment, and property levied upon, other creditors cannot, on their own motion, be made parties defendant, on the ground of collusion between the plaintiff and defendant, and permitted to show that the defendant is not indebted to the plaintiff; nor can they be allowed to show that the attachment was wrongfully sued out.

Appeal from the Linn District Court.

THURSDAY, APRIL 7.

WHIPPLE commenced suit against Cass, in the district court of Linn county for the sum of \$10,269 71, and prayed

Whipple v. Cass.

an attachment against his property, on the alleged ground that the defendant was "about to dispose of his property, without leaving sufficient remaining for the payment of his debts." Notice of the suit was served personally on the defendant, and a writ of attachment issued, under which his property was seized by the sheriff.

At the September term of the district court, no defense being made to the suit, by Cass, it was adjudged by the court that he was in default. At which time, came James F. Hervey & Co., Bailey, Brown & Co., and others, alleging to the court that they were creditors of the said Cass to a large amount; that they had caused writs of attachment to be issued, and levied on the goods of the defendant, Cass, being the same goods previously taken and seized by the sheriff at the suit of the plaintiff, Whipple. And the said creditors state and suggest to the court that the writ of attachment of said Whipple against the defendant, Cass, is prosecuted with collusion between said plaintiff and defendant, for the purpose of hindering, delaying, and defrauding them, the above named creditors, in the collection of their debts; that the greater part of the sum claimed by the said plaintiff was not, at the time of the commencement of said suit, and still is not due from said defendant to said plaintiff, Whipple; that said Cass is wholly insolvent, and all his property attached in said suit, except notes and accounts already transferred to said Whipple; and that, unless the property of said Cass so attached by said Whipple, is made liable to pay the claims of the said creditors, they are wholly without remedy for the collection of their debts. They therefore pray the court that they may be allowed to defend the suit against Cass, by an issue to be made upon the averments of their petition, as the court may direct; unless the plaintiff will consent to dismiss his said writ of attachment, and consent that the goods seized may be subject to the writs of attachment of said creditors.

The court, having heard the petition of the said creditors, overruled the motion, and refused the application made by them for leave to appear and defend the said suit, and to

Whipple v. Cass.

contest the claims of the said Whipple against the said Cass, to which ruling of the court the said creditors except, and now appeal to this court.

Isbell, Hubbard & Stephens, for the appellants, in support of the right of creditors to come in and defend against the attachment, cited: Drake on Attachments, secs. 770 to 777. Buckman v. Buckman, 4 N. H., 319; Webster v. Harper, 7 Ib., 594; McClung v. Juckson, 6 Grattan, 96; Walker v. Roberts, 4 Richardson, 561; Brown v. Chaney, 1 Georgia, 410; Smith v. Gettinger, 3 Ib., 140; Code, sec. 1684, 1700.

No appearance for the appellee.

STOCKTON, J.—The petitioners, claiming to be the creditors of Cass, could not be permitted to defend the suit for him, and show that he was not indebted to the plaintiff, Whipple, in the amount claimed, or any other sum. Cass was duly served with notice of the action, and if he did not make defense, no one else could defend for him. Nor could the creditors be permitted to show that the attachment was wrongfully sued out, and ought to be quashed. Such defense lay only with the defendant, Cass, and he did not see proper to make any such defense, if any such existed.

Nor should the petitioner have been allowed to take issue on the facts alleged in the plaintiff's petition for attachment. It has been held by this court that no such issue can be made, even by the defendant in the principal suit. Sackett, Belcher & Co. v. Partridge & Cook, 4 Iowa, 416. Much less can such issue be made by an entire stranger to the suit.

The particular object of the creditors, in their petition to the court, was to be allowed to show that the suit is prosecuted by collusion between the plaintiff, Whipple, and the defendant, Cass, for the purpose of hindering, delaying, and defrauding the creditors of said Cass; in order that by such showing, they may be enabled to postpone the lien Collins v. Ripley, County Judge.

of the plaintiffs upon the goods attached, and that their own lien may be declared prior thereto.

We think the petitioners have chosen the wrong jurisdiction for the assertion of their rights. We see no method in which the relief sought can be awarded in a court of law, even taking all the facts alleged to be brought to its knowledge. Fraud, it is true, vitiates all contracts, even so solemn a proceeding as a judgment of a court of record. But the relief sought by the petitioners, in this instance, is such only as can be administered in a court of equity, where frauds, such as are alleged in the present case, are peculiarly cognizable.

Judgment affirmed.

Collins v. Ripley, County Judge.

Where a complainant in chancery alleges that he is a citizen and resident of the county, and, as such, interested in the public welfare, he shows such an interest as entitles him to present a petition for, and obtain an injunction to, restrain a public officer from the commission of an act which would be a public wrong.

The words, "in these respects," in section 2506 of the Code, refer to the person or body to whom the bond is made payable; and, under the same section, a bond running to the county judge is the same as if made to the county, and can be sued upon by it.

The fact that a bond for an injunction, to restrain a county officer from committing a public wrong, is executed to the county judge in his official capacity, instead of the county itself, affords no grounds for dissolving the injunction.

Appeal from the Floyd District Court.

FRIDAY, APRIL 8.

In March, 1858, a petition was presented to the county judge of Floyd county, praying that a vote might be taken at the succeeding April election, upon the question of the removal of the county seat from St. Charles to section Vol. VIII.—17

8 129 137 129 Collins v. Ripley, County Judge.

twelve, township ninety-five north, range sixteen west, near the geographical center of the county. The petition was granted, and notice issued for such an election.

During the same month, a petition for an injunction was presented to the Hon. T. S. Wilson, judge of the second judicial district, to restrain further proceedings in the above This petition represented that David Ripley, the county judge of Floyd county, had acted as an attorney and counselor in the same, giving advice and direction therein; that he had signed one of the petitions; and that he was interested, being the owner of part of the section twelve, upon which the applicants sought to locate the county seat. It is further shown, that before the final action of the judge upon the matter, affidavits were filed, stating the above objections to his acting, but that he disregarded them, and proceeded therein, and afterwards refused to allow an appeal. The petition further states that a large portion of the names appended to the request presented to the judge, were not originally subscribed to that petition, but were cut from various other petitions, and attached to that one.

On the 10th of March, the judge of the district court allowed the injunction, restraining the county judge and justices of the peace of Floyd county, from canvassing the votes which might be cast at the April election upon the above question, and from declaring the result. He further ordered the petitioner in this bill to give bond in the penal sum of one thousand dollars, payable to the county judge of Floyd county. Such bond was given, and was approved by the clerk.

At the June term, 1858, of the district court, the respondent filed a motion to dissolve the injunction, "for the reason that there is no party or respondent to whom the bond can run, and that the inability of the respondent to sue upon the bond in this case filed, is a sufficient reason for dissolving the injunction;" and second, because "A. L. Collins does not show himself entitled to become the rela-

Collins v. Ripley, County Judge.

tor." The court sustained this motion, and the complainant appeals.

Wiltse & Fairfield, for the appellant.

J. O. Crosby, for the appellee.

WOODWARD, J.—The error assigned is the sustaining the motion to dissolve the injunction, "for the reasons set forth in said motion;" and we will limit ourselves to these reasons.

When the defendant says that the petitioner is not entitled to become relator, we presume he means petitioner, for it is only the position of a complainant in a bill in equity, praying an injunction, that Collins assumes, and not that of relator in an information for a mandamus or for a quo warranto.

We do not readily see the force of the reasoning assigned in the motion. Collins complains in behalf of himself and others, as it is understood, though imperfectly stated, whom he represents to be citizens and residents of St. Charles, the present county seat; and avers that they are directly and materially interested in the retention of it at that place. His position as a citizen, and his interest as such in the public welfare, entitle him to present a petition to restrain a public officer from an act which would be a public wrong. There is some analogy between this, and the case of a relator applying for a mandamus in a public matter, and it has been held that one holding such relations, might present an information for that purpose. The State, ex rel. Rice v. The Co. Judge of Marshall Co., 7 Iowa, 186; and The State, ex rel. Byers v. Bailey, County Judge, et al., 7 Ib., 390. The doctrine held in those cases, is sufficient to sustain the position of the petitioner in this case.

And the other objection does not appear to have more force than the above. The district judge ordered the

bond to be given to the county judge, and it is so given to him in his official capacity. The Code, (section 1693), provides, that when a bond is given to the state, a county, or any officer, whether intended for the security of the public or individuals, suit may be brought thereon by any person intended to be thus secured. And section 2506 enacts, that bonds relating to public matters, and concerning the inhabitants of a county, may be made payable to the county; and if concerning the inhabitants of more than one county, may be made payable to the state. But a mistake in these respects will not vitiate the security. Here the words "in these respects," refer to the person or body to whom the bond is made payable, so that the security in the present instance, running to the county judge, is the same as if made to the county, and can be sued upon by it. There is, then, no want of a party obligee, nor of a person competent to sue, and the objection fails.

Therefore, the order of the district court is reversed, and the cause remanded.

BURKE V. BARRON et al.

Dower. The land was located with a military land warrant, issued by the United States to O. M. B., the husband of complainant. The warrant was sent from Ohio to M., of Johnson county, Iowa, by one E., with directions to sell it. It was not assigned, and was not, by the law, in force at the time, assignable. M. sold it to to J. B., one of the respondents, on a credit, and located it for him on the land, in the name of O. M. B., with the understanding that E. should make a deed in fee simple when the money was paid for the warrant, according to agreement. M. did not know O. M. B., and did not act for him in the business. After the location of the warrant by M., O. M. B. executed to E. a title bond for the conveyance of the land to him, on condition that E. should, by a day named, pay to O. M. B. the sum of \$160,00 specified as the price agreed therefor. O. M. B. died January 16, 1853. J. B. obtained a decree against E. for a conveyance; and afterwards ascertaining that the legal title was in the heirs of O. M. B., who had died in the meantime,

he obtained a decree against the administrator and heirs of O. M. B., for a conveyance by them. *Held*, That the widow of O. M. B. was entitled to dower in the land.

A widow's right of dower in the real estate of her husband accrues at the time of his death, and becomes a vested right before assignment, which the general assembly, by a subsequent statute, can neither reduce nor take away.

The act entitled "An act to amend chapter eighty-three of the Code," approved January 24, 1853, by which section 1394 is repealed, does not refer to, and include, rights of dower accrued previous to its enactment.

Appeal from the Scott District Court.

FRIDAY, APRIL 8.

Dower. The land in which dower is claimed, was located by virtue of a military land warrant, issued by the United States to Ora M. Burke, the husband of the plaintiff. This warrant was sent from Ohio to J. W. McCaddon, of Johnson county, Iowa, by one Easton, with directions to sell it. It was not assigned, and was not, by the law in force at the time, assignable. McCaddon sold it to Barron, on a credit, and located it for him on the land in question, in which dower is claimed, in the name of Burke, the warrantee, with the understanding that Easton, should make a deed in fee simple, when the money was paid according to agreement. He did not know Burke, and did not act for him in the business.

After the location of the warrant by McCaddon, Burke executed to Easton atitle bond for the conveyance of the land to him, on condition that Easton should, by a day named, pay to Burke the sum of \$160,00, specified as the price agreed therefor. Barron obtained a decree against Easton for a conveyance; and afterwards, ascertaining that the legal title was in the heirs of Burke, who had died in the meantime, he obtained a decree against the administrator and heirs of Burke, for a conveyance by them. 3 Iowa, 76. After this decree, the plaintiff, as the widow of Ora M. Burke, applied to have her dower in this land set off to her.

A decree was rendered in her favor, from which the respondents appeal.

James Grant, for the appellants, relied upon Fort v. Wilson, 3 Iowa, 156; Hill on Trustees, 269; Fisher v. Fields, 10 Johns., 496; Lawrence v. Miller, 1 Sandf., 516; Blain v. Harrison, 11 Ill., 484.

D. L. Shorey, for the appellees, cited Young v. Wolcott et al., 1 Iowa, 174; Coke on Littleton, 31, a note.

STOCKTON, J.—I. If there was any testimony going to show that Burke, in his lifetime, had parted with his interest in the land warrant, we should be inclined to hold, that after its location in his name, the plaintiff was not entitled, as his widow, to dower in the land. But there is no testimony on the subject. How the warrant came into the possession of Easton, is not shown. His possession of it, is not sufficient to show title to it, when the title did not pass by mere delivery. Holland v. Hensley, 4 Iowa, 222. Any presumption of property in Easton, arising from his possession, is rebutted by the fact of his afterwards taking a bond from Burke for a conveyance, on the payment of the \$160. The judgment of the court, that the plaintiff was entitled to dower in the land, we think, was not erroneous.

II. It is claimed that the court erred in awarding to the plaintiff as her dower, one-third in value of this land, as her property in fee simple. Burke died January 16, 1853, at which time the plaintiff's right of dower accrued. By the act of January 24th, 1853, (Session Acts, 97), the provision of the Code which secured to the widow, in fee simple, at the death of her husband, one-third in value of his real estate, was repealed. The defendant's proposition is, that this repeal was without any saving clause; that the widow's dower, in this case, had not been assigned to her, and was not, consequently, a vested right; that until the right to dower becomes vested by assignment, there is no vested es-

tate in dower; and that it being the creature of the statute, and not existing by contract, it may be changed by the legislature at any time before it is assigned.

We do not admit entirely the premises of the defendant, nor the conclusion he seeks to draw from them. The repealing act in this case, does not necessarily refer to, and include rights of dower accrued previous to its enactment. The rule of construction in such case, as fixed by the Code, provides that the repeal of a statute, does not affect any right which accrued under, or by the virtue of, the statute repealed. Section 26. The plaintiff's right of dower in the land, accrued at the death of her husband; and the legislature could as well take away her right altogether, as reduce it from a fee simple to a life estate, after it had accrued.

Courts will give to statutes a prospective effect only, unless the language is so clear and imperative as not to admit of a doubt. The supreme court of the United States has said, that "every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective; and is generally unjust, and may be oppressive, and it is a good general rule, that a law should have no retrospect." Calder v. Bull, 3 Dallas, 386, 391.

It has been repeatedly decided, (says Mr. Sedgwick), that it is not competent, by any act of legislation, to divest a vested interest in real estate. Such acts are undoubtedly void for several reasons; they take away private property without compensation; they take away property without any process of law; and they are not acts of a legislative character. Sedg. Const. & Stat. Law, 681.

Unless the power is considered by the court, as used for the benefit of the parties interested, vested interests are not deemed subject to legislative control. Joint tenancies have been turned into tenancies in common in Massachusetts, by a retrospective statute—the courts seeing no constitutional objection to the power of the legislature to alter the tenure, by substituting another tenure more beneficial to all the ten-

ants. Holbrook v. Finney, 4 Mass., 566; Miller v. Miller, 16 Ib., 59; Binghard v. Turner, 12 Pick., 539.

It is difficult to define with exactness in all cases, what is a vested right, or to lay down a general rule which will describe with precision, the extent to which legislative interference with rights or interests in property, is permitted or pro-Some vested rights are protected by the federal constitution; others, by the general limitation of the law making power; and by that limitation arising from the division of the powers of the government into executive, legislative, and judicial. Under this division, the prohibition of retrospective acts, and the non-interference, so far as it is enforced, with vested rights, in cases which do not come within the prohibition of the positive clauses in our constitution, state or federal, in regard to private property and contracts, will be found to be summed up in the idea, that the legislature can only make laws, or legislative enactments, as contradistinguished from judicial sentences and decrees. on Stat. & Const. Law, 676.

Whether marriage is a contract embraced within the constitutional prohibition, or is a mere civil relation, entirely subject to the control of municipal law, is a vexed question, upon which different and conflicting decisions have been made. In *Dartmouth College* v. *Woodward*, 4 Whart., 538, it is impliedly admitted by Chief Justice Marshall, and expressly asserted by Mr. Justice Story, that the marriage contract is within the constitutional protection. So, it has been held in Missouri, that marriage is a contract within the meaning of the constitution. *State*, use of Gentry v. Fry, 4 Mo., 120; Bryson v. Campbell, 12 Missouri, 498.

In New York, it was said by the supreme court in White v. White, 5 Barbour, 474, that marriage was not a contract, in the strict common law sense of the term. In Lawrence v. Miller, 2 Comstock, 250, it is said by Shankland, J., that "as the widow's right to dower, is a right acquired by the marriage contract, and one of the benefits promised to her by the law of the contract, in consideration of her en-

tering into that relation, it comes fairly within the letter and spirit of the prohibitory clause of the constitution, as a contract which cannot be impaired by subsequent legislation." See, also, Kelley v. Harrison, 2 Johnson's Cases, 29; Jackson v. Edwards, 22 Wend., 498; Holmes v. Holmes, 4 Barbour, 296. So, also, in Florida, the marriage contract is considered within the protection of the constitution. Ponder v. Graham, 4 Florida, 23.

On the other hand, in Maine it has been held, that the clause of the constitution in regard to the obligation of contracts, does not relate, or apply to marriage. 16 Maine, 479. And in Kentucky, marriage is treated as an institution created by the public law, and subject to the public will. *Maguire* v. *Maguire*, 7 Dana, 184. According to Chancellor Kent, this is the true construction. 1 Kent's Com., 417.

It has been held in New York, that dower is not the result of a contract, but a positive institution of the state; and a law extinguishing the widow's right to dower during the husband's lifetime, does not infringe the provision of the federal constitution in regard to contracts. *Moore* v. *The Mayor*, &c., 4 Selden, 110.

Without considering, however, the question of the power of the legislature to change the law in relation to dower, during the husband's lifetime, we are clearly of opinion, that under the law as enacted by the Code, (section 1394), the plaintiff's in the real estate in question, at the death of her husband, had all the attributes of a vested right. was a right to one-third of the land in fee simple. mit the construction sought to be given to the repealing act of January 24, 1853, by the defendant, would be not merely to give the act in question a retrospective effect, when there is nothing to indicate that such was the object or intention of the legislature; but it would be to give it such effect for the purpose of taking away a vested right. Dower is, perhaps, of all others, the estate most favored in law and equity. 3 Brown's Ch., 264. A presumption of a Vol.VIII.--18

State of Iowa v. Seaton.

change in the law, to the prejudice of the widow, is not to be indulged. GARDINER, J., in Lawrence v. Miller, 2 Comstock, 255.

In Kelley v. Harrison, 2 Johns. Cases, 29, the principle was established that by the marriage and seizin of the husband, the wife's right to dower became a vested right, and could not be impaired by the subsequent acts of the government. And, of course, not by subsequent legislation. See, also, Jackson v. Edwards, 22 Wend., 498. As the circumstances of the present case do not seem to require it, we do not wish to be understood as expressing any opinion on this point.

For the reasons indicated, we are of opinion that the repealing act of January 24, 1853, can have no such effect as to change the rights of the plaintiff in the real estate of her husband, as they stood under the act repealed, at the time of his death.

Judgment reversed.

THE STATE OF IOWA v. SEATON.

Where, on the trial of an indictment for perjury, in which the defendant was charged with falsely and corruptly swearing substantially as follows: That he saw S. give the sum of ten dollars to one E. some time in the latter part of December, 1856, which said S. requested him to pay to one C., and that he saw said E. pay the money to C. a few days thereafter, in Baltimore township, in Henry county," the said E. was called as a witness, and testified that he did not pay the money to said C. "at the said time, between the 25th of December and the 1st of January, but was away out of the county of Henry from Christmas to New Years, or the night previous," and thereupon the defendant offered to prove, by one J., that he saw said E. in the vicinity of Boyles' mill, in said county, between Christmas and New Year; and to show, by said witness, circumstances which tended very strongly to impress the fact on his memory, and also fixed the time, which evidence was rejected by the court; Held, That the evidence was admissible, under the circumstances.

The State of Iowa v. Seaton.

Appeal from the Henry District Court.

FRIDAY, APRIL 8.

THE defendant was indicted for perjury, upon a matter in which it became a question whether one George Seaton had given ten dollars to one Peter Ebe, in the county of Henry, in the month of December, 1856, to be by him paid to one Milliken Clark, and whether the said Ebe did so pay it over; upon which the defendant testified that he saw the said G. Seaton give the said sum of money to the said Ebe, some time in the latter part of December, 1856, which said Seaton requested him to pay to said M. Clark, and that he saw said Ebe pay the money to Clark a few days thereafter, in Baltimore township in said county. bill of exceptions shows, that in the present case, Ebe testified that he did not so pay the money to said Clark, "at the said time, between the 25th December, and the first of January, but was away out of the county of Henry, from Christmas to New Years, or the night previous." The defendant then offered to prove by one Boyles, that he saw said Ebe in the vicinity of Boyles' mill, in said county, between Christmas and New Years, and to show by the witness, circumstances that tended very strongly to impress the fact on his memory, and also fixed the time; but the court, on motion, excluded all this testimony, and refused to permit it to be given, for the reason that it was immaterial and irrelevant. The defendant excepted, and assigns this as error.

R. L. B. Clarke, for the appellant.

C. Ben Darwin, for the appellee.

WOODWARD, J.—We think it sufficiently apparent from Ebe's testimony, and the rest of the case, that the question of time and place had arisen, as connected with that of payment, and that the time had narrowed down to the inter-

val between the 25th of December and the first of January; and in this position of the case, Ebe, by way of an argumentative fact, showing that he could not have paid it, testifies that he was not in the county at that time. The time of the payment would be immaterial, except in the view that the proof showed that defendant fixed the time as between the above dates, and the place in Baltimore township, in Henry county, to which Ebe says he was not in the county within that time. To this again the defendant replies, offering to show that he was in the county, and in that township within that time. This was important, both as showing that he was at a place where he might have paid the money, and that he could have done what the defendant has sworn; and also as impeaching him. If that time did not become important, as above suggested, still, if Ebe had testified positively in relation to it, and could be impeached in his evidence concerning it, this would tend to weaken his testimony, and might induce a jury to give him less credence on other points.

We think the court erred in excluding the evidence offered by the defendant. As this disposes of the case, and is the most material question made, it is unnecessary to pursue the others.

Judgment reversed.

NEWELL v. HAYDEN.

In an action of replevin, where the residence of the plaintiff becomes material, it may be proved without a specific allegation to that effect in the petition.

Where property is replevied from an officer, on the ground that it was exempt from execution; and it is sought to show that the plaintiff is a non-resident of the State, and not entitled to the exemption, such defense should be set up by the defendant, rather than rebutted in the first instance, by the plaintiff.

The exemption of property from execution relates to the remedy, and is

governed by the law of the place where the contract is sought to be enforced, instead of the lex loci contractus.

Where, in an action of replevin to recover the possession of a mare, claimed to be exempt from execution, after the plaintiff had offered evidence of his residence in this state, the defendant offered to prove that the mare was sold by L. & L., of Chicago, Illinois, to N. & Co., of which firm plaintiff was a member; that plaintiff then resided in Illinois; that in consideration of the sale of said mare, N. & Co. made their note to L. & L., which note was executed and payable in Illinois; that by the law of that state, the mare was not exempt from execution; that soon after the making of the note, the plaintiff, without the knowledge of L. & L., absconded from said state with said property, and came to Dubuque, in Iowa, where he was pursued by L. & L., who, to collect said note, sued out a writ of attachment against N. & Co.; and that, under the said writ, the mare was attached, which evidence was rejected; Held, 1. The pleadings did not present the issue of fraud. 2. That the evidence was properly rejected.

Appeal from the Dubuque District Court.

FRIDAY, APRIL 8.

Replevix for a mare and set of harness, claimed as exempt from execution. The answer, after denying the allegations in the petition, sets up that the mare was sold by Loomis & Lewis, of Chicago, Illinois, to Newell & Co., (of which last firm the plaintiff was a member); that plaintiff then resided in Illinois; that in consideration of the sale of said mare, Newell & Co. made their note to said Loomis & Lewis, which note was executed and payable in Illinois; that by the laws of that state, (the parts relied on being set out in words in the answer), the said mare was not exempt from execution; that soon after making this note, said plaintiff. without the knowledge of L. & L., absconded from said state with said property, and came to Dubuque, in Iowa, where he was pursued by L. & L., who, to collect said note, sued ont a writ of attachment against Newell & Co., which was delivered to defendant, as sheriff of Dubuque county, by virtue of which he seized the property in controversy, which seizure, it is alleged, is the taking and detention com-

plained of. All of these averments are denied by the replication. On the trial, certain testimony was objected to, and admitted, as will appear from the opinion. A verdict was rendered for plaintiff, subject to the opinion of the court as to whether, (upon a motion for a new trial), defendant was entitled to prove the allegations in the answer, that the property was purchased in Illinois, and that the same was not exempt from execution by the laws of that state, as also the absconding of the plaintiff, and the pursuing of him by the attaching creditors. Motion for a new trial overruled, and judgment on the verdict. Defendant appeals.

W. S. Jennings, for the appellant.

Vandever & Friend, for the appellee.

WRIGHT, C. J.—This case is submitted without argument or brief, and we have nothing to guide us to the position assumed by appellant, but the assignment of errors. This assignment may be reduced to two points:

First. That there was error in admitting, against defendant's objection, evidence of the residence of plaintiff.

Second. In rejecting the defendant's evidence in support of his answer, as in avoidance of plaintiff's action.

The objection to the evidence was based upon the ground that plaintiff had not in his petition averred that he was a resident of this state, and therefore could not prove it.

The law requires that the petitioner in an action of replevin, shall state that the property is wrongfully detained by the defendant; that the plaintiff is entitled to the present possession thereof; and that it was not taken from him by any legal process, or if so taken, that it was exempt from seizure by such process. The alleged cause of detention, according to the best knowledge and belief of plaintiff, must also be stated, as well as the value of the property. Code, section 1995. The petition in this case makes every averment required by law. It is not stated, however,

that said plaintiff was at the time of the seizure a resident of the state. Nor was such an averment necessary. It is true, that if he was a non-resident, he was not entitled to the benefit of the exception. Section 1902. But such non-residence would be a ground of defense to be set up by defendant, rather than to be rebutted in the first instance by the petitioner. Section 2519. We do not wish to be understood as saying that plaintiff should not be held to prove his residence, but that if his petition contains what is required by section 1995, it is sufficient to admit such proof, without a specific allegation to that effect. Upon the principle involved, see *Prindle* v. *Caruthers*, 1 Smith, (N. Y.), 425; *People* v. *Ryder*, 2 Kernan, 433.

We are left to conjecture the grounds assumed by the appellant under the second assignment of errors. The leading thought, judging from the answer and bill of exceptions, would seem to have been that as the property was not exempt under the laws of Illinois, where the contract was made and payable, it could not be in this state, where a different law prevails; or, in other words, that the lex loci contractus, and not the lex fori, must govern. We think, however, that there can be no doubt but that the exemption relates to the remedy, and must be governed by the law of the latter. Helfenstein & Gore v. Cave, 3 Iowa, 287; 2 Story's Eq. Jur., secs. 556 to 577.

If the argument is suggested, that the property was purchased; that the plaintiff obtained it from the firm of which he was a member, and absconded from Illinois, with the intention to perpetrate a fraud upon the plaintiffs in the attachment suit; that if so, the property was not his, but liable to the process; and that defendant should for the purpose of establishing this fraud, have been permitted to prove the special matter set up in his answer; we say, if this be the ground assumed by defendant, the reply is, that his answer sets up no such defense. Fraud is nowhere averred or pretended. No such issue is presented.

Judgment affirmed.

Blair & Co. v. Marsh et al.

Where the vendor of real estate, to which he retains the legal title, and for which he has executed a bond for a deed, assigns a promissory note, received in consideration of the sale of said land, and agrees that the assignee shall be substituted to the benefit of all security held by him, the assignee of the note, upon its non-payment, is entitled to the same rights as the vendor himself; and he may file a bill in his own name, against the vendee, and all persons claiming under him, with notice, for a foreclosure and sale of the premises.

In such a case, the vendee is to be regarded as a mortgagor; and he and those claiming under him, with notice, cannot raise the objection that the complainant is a mere assignee, and that the relation of vendor and vendee does not exist between them.

Bill of foreclosure, alleging that in May, 1857, the defendant, L., sold to his co-defendant, M., certain lots in the town of Mount Pleasant, at the price of \$3,000; that one-half of the purchase money was paid, and for the remainder, M. executed his two promissory notes for \$750 each, payable January 1, and March 1, 1858; that it was agreed that L. should retain the title of the lots until the notes were paid, and give to M. a title bond for a conveyance, on the payment of the balance of the purchase money; that on the payment of the \$1500, and the execution of the notes, M. was put in possession of the lots; that M., being indebted to B. O. & Co., for money borrowed, as collateral security for the payment of the same, assigned to them the title bond of L.; that before the second note became due, the complainant purchased and took an assignment of the same from L., without recourse, and looking solely to said lots as the security for the payment of the same; that it was then agreed between them that the complainant should succeed to the benefit of all the security held by L. for the payment of the same; that the note is due and unpaid; and that M. is wholly insolvent. The bill makes L., M. and B. & Co. parties, and prays that M. may be required to perform his agreement with L.; that, in default thereof, all the interest of M. and B. O. & Co. in the lots may be foreclosed, and sold to satisfy his claim; and that on the payment of the same, L. may be required to convey the lots to the purchaser. Demurrer to the bill by M. and B. O. & Co., for the reason that complaint was a mere assignee of L., and that the relation of vendor and vendeedid not exist between complainant and themselves, which was sustained; Held, 1. That the right of L. to foreclose against M. for non-payment of the note, was a quality incident to the debt, which passed by the assignment of the note, and the agreement between L. and the complainant; 2. That the complainant possessed the rights of L., and could foreclose in the same manner, in his own name; and 3. That the court erred in sustaining the demurrer.

Appeal from the Henry District Court.

FRIDAY, APRIL 8.

THE bill in this case alleges, that in May, 1857, the defendant, Lee, sold his co-defendant, Marsh, certain lots in the town of Mount Pleasant, at the price of \$3,000; that one-half the purchase money was paid, and for the remainder. Marsh executed his two promissory notes for \$750 each, payable January 1st and March 1, 1858; that it was agreed that Lee should retain the title to the lots, until the notes were paid, and give to Marsh a title bond, for a conveyance, on the payment of the balance of the purchase money; that on the payment of the \$1,500, and the execution of the notes, Marsh was put in possession of the lots; that Marsh, being indebted to Barclay, Ogg & Co., for money borrowed, as collateral security for the payment of the same, assigned to them the title bond of Lee; that before the second note became due, the complainant purchased, and took an assignment of the same, from Lee, without recourse on Lee. and looking solely to said lots as the security for the payment of the same; that the note is due and unpaid, and that said Marsh is wholly insolvent, and complainant, having no other recourse, prays the court that Marsh may be required to perform his said agreement with Lee; that in default thereof, all the interest of said Marsh, and Barclay, Ogg & Co., in the lots, may be foreclosed, and sold to satisfy the claim of complainant; and that on the payment of the same, the said Lee be required to convey the said lots to the purchasers.

There was a demurrer to this bill by the defendants, Marsh, and Barclay, Ogg & Co. The demurrer was sustained by the court, and the bill dismissed.

Ambler & Woolson, for the appellant.

No appearance for the appellec.

Vol. VIII.-19

STOCKTON, J.—It is averred in complainant's bill, that it was the agreement between Lee and himself, at the time the note was assigned to him, that he should take it without recourse upon Lee, in case of non-payment by Marsh, but that, in such event, he should succeed to the benefit of all the security held by Lee, for the payment of the same.

This security held by Lee, and by him assigned to complainant, must be understood to include such as is given by the statute, (Code, secs. 2094-5), to the vendor of real estate, when part, or all, of the purchase money remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, to file his bill against the vendee, praying the court to require him to perform his contract, or in default thereof, to foreclose and sell his interest in the property.

Courts of equity, where the title has passed to the vendee, will enforce the lien of the vendor for the unpaid purchase money, against the vendee and his heirs, and other privies in estate, as well as against all subsequent purchasers, having notice that the purchase money remains unpaid. Much more readily will this relief be granted, where the title still remains in the vendor, who has given only a title bond for a conveyance, on the payment of the purchase money.

When the day fixed for payment is passed, and the money is not paid, the vendor may, in equity, call upon the vendee to perform his contract; and in case of his failure to pay the money, he may have a decree for the rescission of the contract, or for the foreclosure of the vendee's right in the premises, and for a sale of the same, to satisfy the unpaid purchase money. Under the statute, the vendee for the purpose of foreclosure, is treated as the mortgagor of the property, and his rights may be foreclosed in the same manner.

As the assignees of the promissory note for the purchase money remaining unpaid, and by virtue of the agreement with Lee, that they should be substituted to the benefit of all security held by him for its payment, the complainants were entitled to the relief prayed for in their bill, against

the defendants Marsh, and Barclay, Ogg & Co. These defendants are not entitled to interpose the objection, made by the demurrer to the complainant's prayer for relief, that the complainants are mere assignees of Lee, and that the relation of vendor and vendee did not exist between the complainants and themselves.

By virtue of the statute, they are to be treated, for all the purposes of this suit, as mortgagors, and their rights as such may be foreclosed and sold.

By the assignment of the note, all the right of Lee, to foreclose against Marsh, passed to complainants, and they may maintain the action in their own name. The right of Lee to foreclose against Marsh, for non-payment, was a quality incident to the debt, which passed by his assignment, and by virtue of his agreement, to complainants, in analogy to the principle of equity, by which the assignor of a bond and mortgage has been held to be security for its payment, in such a sense, that any collateral security held by him for the payment of the debt, will enure to the benefit of the assignee of the bond and mortgage. Crow, McCraney & Co. v. Vance, 4 Iowa, 434; Curtis v. Tyler, 6 Paige, 431.

Lee, on the non-payment of the note by Marsh, (to say nothing of his right for such non-payment, to rescind the con tract, and pay back the money received,) was entitled to a decree against Marsh, for a specific execution of his agreement; and, in default of payment, to a decree of foreclosure of his right in the property, and for the sale of the same to pay the balance of the purchase money. The complainants are entitled to the same rights; and it may be enforced by them, as though they were the holders, by assignment from Lee, of the promissory note of Marsh for the purchase money, secured by mortgage on the premises.

Barclay, Ogg & Co. are charged to be purchasers, with notice. If they were the purchasers of the title bond only, in good faith, for a good consideration, and without notice of complainants' rights, they were the purchasers of an equivonly, which they must yield to the rights of Lee, as the

Borland v. The Mississippi & Missouri Railroad Company.

holder of the legal title, and to those of complainants asserted under Lee. But they were informed, by the terms of the bond assigned to them, that two notes were executed by Marsh for the unpaid purchase money, and that until these were paid, no conveyance was to be made by Lee. This was sufficient to put them on inquiry. They are not, therefore, innocent purchasers, any more than they are holders of the legal title.

The objections made upon the demurrer, we have considered as made by the vendee and those holding under him. Coming from them, we consider them insufficient, and the demurrer should have been overruled.

We will, of course, not be considered as deciding any question as to the right of Lee, the vendor, to rescind in toto his contract with Marsh, by reason of the non-payment of the purchase money; nor as to his right to object, in any proper manner, to the relief prayed by complainants. Lee was not a party to the demurrer put in by the other defendants, and no question affecting his rights arose upon the same. We have considered only whether the objection made, could be rightfully interposed by Marsh, and Barclay, Ogg & Co.

The judgment of the district court upon the demurrer, will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

BORLAND v. THE MISSISSIPPI & MISSOURI RAILROAD COMPANY.

Where a party appeals to the district court, from the assessment of damages of a jury appointed by the sheriff, under the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853, he is in court, for all substantial purposes; and if he does not appear and urge his right to a new assessment, and the verdict of the jury

Borland v. The Mississippi & Missouri Railroad Company.

is affirmed, he cannot object to the proceedings in the appellate court on the ground of a want of notice.

In such cases, the appeal brings the cause to the district court upon its merits, and it becomes immaterial whether the appellant had notice.

Appeal from the Johnson District Court.

FRIDAY, APRIL 8.

The petitioners applied for an assessment of damages, in consequence of the railway of the defendant's running over their land. The proceeding was under the act of January 18, 1853. Acts of 1853, 58. The sheriff sets out his proceedings in the appointment of a jury, the swearing them, their report, &c., and says nothing concerning having notified the defendants, and it is not shown that they appeared. The commissioners reported a sum as the amount of damages to be paid by the company, and they appealed according to the provisions of section four of the act. The district court affirmed the verdict and judgment of the commissioners, and the defendants appeal to this court.

Cook, Dillon & Lindley, for the appellants.

Clark & Bro. and W. Penn. Clarke, for the appellee.

Woodward, J.—Upon the appeal to the district court, the defendants were entitled to a re-hearing upon the question of damages, and they might have caused them to be re-assessed by a jury of twelve men. By their appeal, they were in court for all substantial purposes; and if they did not appear and urge their right to a new assessment, they could not afterward object the want of notice. The appeal took the cause up on its merits; and it enabled them, in effect, to set right the consequences of any wrong doing, or partiality of the commissioners, or the sheriff. It became immaterial, whether they had notice.

Levi v Karrick et al.

This is the view heretofore taken upon this question, where an appeal has been resorted to, and it follows that the appellant cannot object the want of notice. This view also supercedes the question made by the plaintiff, whether the notice need to appear in the record, or whether it may be shown otherwise, upon the defendant objecting the want of it. There is no doubt but that either party is entitled to notice of the calling upon the commissioners to act, but we need not stop to determine these other questions connected with it, since, in the present case, the appeal placed the defendant in the same position he would have been in, if he had been served.

The judgment is affirmed.

LEVI v. KARRICK et al.

Where in proceedings for the dissolution of a partnership, and for an account of the partnership transactions, the cause is referred, by agreement of the parties, to referees, the referees are bound by the agreement of partnership, in stating an account between the partners, and they can exercise no discretion in charging the expenses of the partnership.

Where a bill for a dissolution of a partnership charges one or more of the partners with usurpation of the management and control of the business, and with concealment from the complainant of all knowledge of the partnership transactions; and where the bill prays for the appointment of a receiver, &c., and the cause is subsequently referred to referees, it is the duty of the referees to inquire into, and report upon, all the matters in issue between the parties, for the information of the court.

Before a final decree can be rendered, dissolving a partnership, it is necessary that the assets should be converted into money, and each partner's balance ascertained and allotted to him.

Where in a proceeding for the dissolution of a partnership, the court found that there was due the complainant a certain sum, over and above the amount of his expenses in the business, and the court rendered judgment for that sum in his favor against "the said partnership;" Held, That the judgment was erroneous.

151

EL RES

Levi v. Karrick et al.

Appeal from the Dubuque District Court.

FRIDAY, APRIL 8.

This bill was filed by the complainant, Levi, to have dissolution of the partnership, and a settlement of the partnership accounts, &c. The parties were carrying on the business of mining for lead-ore on lots 264 and 265, in Dubuque county. Their respective mining interests in said lots were as follows: In lot 264, called the "Starr" lot, Levi owned eight-eighteenths, Karrick five-eighteenths, and Jones five-eighteenths of the mining interest. 265, called the "Levi" lot, Levi owned one-sixth, Karrick one-third, and Jones one-half of the mining interest. is averred in the complainant's bill, and not denied in the answer, that by the agreement and understanding of the parties, "each partner was to pay his equal proportion, according to his mining interest in said lots, of all expenses necessary to carry on said business of mining thereon."

Answers were filed by Karrick and Jones, and upon the issues joined by the parties at the February term of the district court, 1858, it was ordered by the court, by the agreement of parties, that the cause, and all the questions and issues thereto pertaining, be referred to referees, appointed by the court, to report their decision and award on the first day of the next term of the court. On the coming in of the report of the referees, the complainant filed exceptions thereto. A portion of the exceptions taken were overruled by the court, and a decree rendered, from which the complainant appeals. The other facts material to an understanding of the points decided, are stated in the opinion of the court.

B. Covel, for the appellant.

Samuels, Allison & Crane, for the appellees.

Levi v. Karrick et al.

STOCKTON, J.—The exceptions taken to the report of the referees, are numerous, and we shall notice such of them only as may be deemed important.

The referees were bound by the agreement of partnership, in stating an account between the parties, to charge to each partner his proportion of the expenses in raising mineral on each lot, according to his interest in said lot.

They have departed from this rule, in those instances in which, instead of ascertaining the actual expenses incurred upon each lot for a given period, they have apportioned the expenses between them in proportion to the amount of mineral raised on each lot. Thus, they report, that during the month of August, 1857, the expenses incurred in digging on both lots for mineral, was \$547 24; and which sum they report should be charged to the respective lots, in proportion to the quantity of mineral raised from each lot. We do not know that the rule adopted by the referees, affords any correct criterion for ascertaining the amount of expenses to be charged to the separate lots, and in the absence of any agreement that such should be the rule, we think it was the duty of the referees to ascertain the true amount of expenses to be charged to each lot.

The complainant further excepted to the report, for the reason that a charge of \$1,802,16, for expenses incurred for machinery, during the month of August, 1857, is charged exclusively to the "Starr" lot. It is claimed that the item of expenditure was incurred for both lots, and should have been charged to both, and not to one exclusively. It is further objected, that the expenses incurred from November, 1855, to September, 1856, during which time no mineral was raised; and from October, 1856, to July, 1857, during which time mineral was raised, said expenses amounted in the aggregate, to the sum of \$10,113 99, are, by the report of the referees, charged to the "Starr" lot exclusively.

The bill charges that expenses properly chargeable to the

Levi v. Karrick et al.

"Levi" lot, have been wrongfully, by the other partners, charged to the "Starr" lot. This charge is not denied by the other partners; and it is admitted by the answer of Karrick, that the labor and machinery had been used for the benefit of both lots, although the machinery was purchased principally for the "Starr" lot.

As the complainant paid four-ninths, of the expense of working the "Starr" lot, and only one-sixth of the expense of working the "Levi" lot, it is evident that there was injustice to him, in charging all the expense, during this period, to the "Starr" lot exclusively. The referees should have apportioned the expense of the machinery and labor to each lot, according to the benefit or advantages accruing to each lot by the expenditure. They could exercise no discretion in charging these expenses to one lot, exclusively. They must be governed by the rights of the respective parties, as shown by the pleadings, and as regulated by law.

The expenses incurred during the month of August, 1857, are found to amount to the sum of \$547.24. A mistake is admitted to have been made by the referees, in apportioning this expense to the two lots. This mistake, though admitted to exist, is not corrected by the district court, in entering up the decree. A more serious objection to the report of the referees, and to the decree of the district court rendered thereupon, is, that there is no final adjudication of the rights of the several partners, and no settlement of the accounts and business of the partnership.

The bill charges a usurpation by Karrick, of the management and control of the business of the partnership, and a concealment from the complainant of all knowledge of its transactions; it charges him also, with gross mismanagement of the business, and a useless and wasteful expenditure of money. For these reasons, a dissolution of the partnership is prayed by complainant, and the appointment of a receiver, and an account, and final ter-

Vol. VIII.—20

Levi v. Karrick et al.

mination of the business. So far as these matters are to be considered as at issue between the parties, they were to be inquired into by the referees, and a report thereupon should have been made, for the information of the district court.

A partnership will not be dissolved for trifling faults and misbehavior of one of the partners, which do not go to the substance of the contract; yet a dissolution should be granted, where there is an impracticability in carrying on the undertaking, either at all, or according to the stipulations of the articles. 1 Story's Eq., sec. 673. So it may be granted on account of gross misconduct of one or more of the partners.

It does not appear, in this instance, that the partnership was to continue for any specified time; and putting out of the question the averments of the bill as to the misconduct of the partners, and the mismanagement of the business, it appears to us that the complainant was entitled to a decree for a dissolution of the partnership, and for the appointment of a receiver to collect the debts and make sale of the property, and to close the business, so that a final settlement might be made of the same. and a final distribution made of its effects. It was necessary, before any final decree could be made, that the assets should be converted into money, and each partner's balance ascertained, and allotted to him. this, the district court, by its decree, ascertains that there is due to the complainant, the sum of \$2,614 46, over and above the amount of his expenses in the business of the firm, and renders a judgment in his favor, against "the said partnership," for the amount so ascertained to be due him; and so as to the other partners.

The decree of the district court will be reversed, and the cause remanded, with directions for the court to render a decree for the dissolution of the partnership, and the appointment of a receiver to close up the business, by collecting the debts and making sale of the assets, preparatory to

a final settlement. If it is shown to the court, that a sudden stoppage of the working of the mines, would work material injury to the interests of the partners, the court may direct a continuance of the same by the receiver, until such time as the work may be advantageously stopped, or until the partners may make some arrangement for the sale and disposition of their interests, which will allow a continuation of said work.

The court may, in its discretion, refer the accounts between the partners to a master, to state the same and report to the court, or may recommit the report of the referees to the same, or other persons, to settle the account in accordance with the views expressed in this opinion.

Decree reversed.

THURSTON v. CAVENOR.

It is entirely competent for a court to discharge the "next friend" of a minor, in whose name an action has been commenced, on his motion, and substitute another to carry on the suit.

In an affidavit for a continuance, on the ground of the absence of a witness, it is not sufficient to state that a party has used due diligence to obtain the testimony; but what has been done should be set forth in the affidavit, that the court may judge of the diligence.

Where an affidavit for a continuance, on the ground of the absence of a witness, stated that the witness is a resident of P. county, (the place of the trial); that he is now temporarily absent, but where he is, affiant does not know; that on a day named, (about a month before the commencement of the term), a subpœna was issued; that it was returned on the third day of the term, "not found;" that up to that time, affiant did not know but that said witness had returned, and had been served; and that affiant had used due diligence to obtain the attendance of said witness, &c.; Held, That the affidavit was insufficient.

Where it is assigned as error that the court allowed certain interrogatories to be propounded to a witness and answered, the material inquiry is, not whether an improper question was asked, but was improper and illegal testimony received by the answer; and unless the answer is disclosed by the record, it is unnecessary to inquire into the correctness or incorrectness of the questions themselves.

Digitized by Google

To maintain an action for a breach of promise to marry, the plaintiff is required to prove the defendant's promise, but not necessarily an express promise; and such promise may be shown by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal understanding between them, their friends and relations, evinced and corroborated by their actions, that a marriage was to take place.

Where the defendant's promise to marry is once shown, it may then be proved that plaintiff demeaned herself as if she concurred in, and approved of, his promise, and thus establish the promise on her part; and for this purpose, her acts may be shown, whether the defendant was present or not, at the time of such conduct.

Where in an action for a breach of promise to marry, the court instructed the jury as follows: "That in determining the question, whether or not there was a promise by defendant to marry plaintiff, they must not take into consideration any declaration made by, or conduct of, the plaintiff, not in the presence of the defendant, (unless they amount to admissions of an engagement between them); that the evidence of plaintiff's declarations, and her conduct, not in the presence of the defendant, were only admitted to show, in the discretion of the jury, a promise or assent on her part, and should be considered by the jury for this purpose alone; and that they are not to be considered at all, unless they first find that there was a promise made by defendant to marry the plaintiff; Held, That the instruction tended more to the prejudice of the plaintiff than the defendant, and that he was not injured thereby.

Appeal from the Polk District Court.

SATURDAY, APRIL 9.

Breach of promise to marry. Judgment for the plaintiff, and the defendant appeals. The facts, material to an understanding of the questions decided, sufficiently appear from the opinion of the court.

Cole & Jewett, for the appellant, in relation to the overruling of the affidavit for a continuance, cited Welsh v. Savery, 4 Iowa, 241. Upon the other points made by them, they cited no authorities.

Brown & Ellwood, for the appellee.

I.-1. If the change in the title of the cause had been

made on plaintiff's motion, and if the same was error, the error is waived by defendant's answering in the case after the change was made, and going to trial on the merits, instead of resting on his motion for dismissing the cause. This principle, we think, is recognised in the following cases: Cook v. Steuben Co. Bank, 1 G. Greene, 447; Taylor v. Galland et al., 3 Ib., 17; Harmon v. Chandler, 3 Iowa, 150; Plummer v. Roads, 4 Ib., 587; Taylor v. Barber, 2 G. Greene, 350. If the court is of the opinion that the doctrine settled in the foregoing cases does not apply, we will take another view of this point, and say: a change in the title of the cause makes a new case, in which defendant appeared and answered without service of notice.

- 2. Admitting, for the argument, that it was error to make the substitution of "next friend," still another answer to this, is: that it is not an error that can prejudice the defendant, and therefore the court will not disturb the verdict, and grant a new trial. Granger v. Busick, 3 G. Greene, 570; De Peyster v. Columbian Ins. Co., 2 Caines, 85; Potter v. Lansing, 1 Johns., 222; Dole v. Lyon, 10 Ib., 451; Duncan v. Duboys, 3 Ib., 125; Fleming v. Gilbert, 3 Ib., 532; Jackson v. Vanderson, 5 Ib., 156.
- II.—1. It was not error to overrule the application for continuance. Diligence is not shown by the application. It does not appear but that defendant knew that the witness was going away, and made no effort to get his deposition. Suppose a party knew his witness was going to be absent at the trial, and made no effort to take his deposition, is he entitled to a continuance in a case, by stating that a subpæna was issued and returned "not found?"
- 2. The fact that a subpœna had been issued, and returned "not found," is a fact to be shown by "the best evidence"—the subpœna, itself, with the return thereon attached to and made a part of the application. That subpœna might show many defects, and we have only the opinion of the witness on the question of law, as to whether it was a subpœna at all or not. Greenleaf on Evidence, sec. 82.

- III.—1. There is no error shown by the record in the ruling of the court, in admitting the testimony. Every question asked the witnesses, Savery and Farner, was a proper question; and for authority on every question put, see 1 Parsons on Contracts, 545; 1 Chitty on Contracts, 537; Southard v. Rexford, 6 Cowen, 254.
- 2. There is not a single answer shown by the bill of exceptions; and, whatever the questions might be, error cannot affirmatively appear without the answers appear. The court is compelled to presume that the court below acted properly, until the contrary appears, and consequently are bound to presume that all improper questions were answered in the negative. Mays v. Deaver, 1 Iowa, 216; Lawson v. Campbell & Bro., 4 G. Greene, 413; 1 Ala., 519; State v. Coven, 7 Iredell, 239; Samuel v. Withers, 9 Mass., 166; Withington v. Young, 4 Ib., 564. Again: the substantial ground of objection to a question must be stated at the trial, or it will not be heard in bank, if the party could have obviated the objection when properly made. Jackson v. Cushman, 4 Wend., 277, and cases there cited.
- IV. There is no error in the instructions given the jury on plaintiff's motion, or in refusing to give defendant's instruction as it was asked, or in giving it as amended by the court. We do not deem it necessary to add anything in relation to the first three instructions appearing in the bill, for we consider them too strong against plaintiff, whether they are correct or not. If there is error, it must be against plaintiff, and not against defendant. The fourth instruction "When the contract is proved, the demeanor and deportment of plaintiff, being that of a betrothed woman, is held to be evidence of her promise of marriage." This instruction is also correct, and contains but a legal proposition. See 1 Parsons on Con., 545, and note; Southard v. Rexford, 6 Cowen's Reports, 254; Wells v. Padgett, 8 Barber, 323; Comyn on Con., 487, 489; Whitman v. Coats, 15 Mass., 1,
 - V. The instruction asked for by defendant was

clearly wrong, without the modification given it by the court, and clearly right as modified and given by the court. Without the modification, it is substantially that plaintiff's declaration made, not in the presence of defendant, and her action, when not in his presence, were not evidence for any purpose. This is clearly error; but is modified by the court in such a manner as to convey to the mind of the jury the idea that plaintiff's declaration and her conduct, when not in the presence of defendant, may be given in evidence for the purpose of showing that plaintiff's affections were engaged to defendant, and was willing on her part to marry defendant. 1 Parsons on Contracts, 545 and note; Whitman v. Coats, 15 Mass., 1.

WRIGHT, C. J.—It seems that plaintiff was a minor, and sued by her next friend. This next friend moved to dismiss the cause, for the reason that he did not wish further to prosecute it. Based upon this motion, defendant also asked that the suit be dismissed. The motion of defendant was overruled, and (as the record states), "the application heretofore made by A. Newton, (the next friend), to be dismissed from this cause, came on for hearing; and, the court being advised in the premises, ordered that said application be granted, and that Kate Thurston have leave to substitute some other person as her next friend." An agreement was then filed, signed by a competent person, consenting to act as such next friend, and to become responsible for the costs. The name of this person was then directed to be substituted, and said cause ordered to proceed in accordance with such substitution, without prejudice to either party. The order of the court directing this substitution, and the refusal to sustain defendant's motion, are now assigned as error.

We are very clear that there was no error in this part of the case. It was entirely competent to discharge the "next friend," in whose name the suit was commenced, and substitute another. And if erroneous to thus substitute, it was

an error without prejudice to the rights of defendant, and he cannot therefore complain.

The second error relied upon is the over-ruling of defendant's motion for a continuance. The continuance was asked on account of the absence of a witness. The affidavit states that the witness is a resident of Polk county; that he is now temporarily absent, but where he is affiant does not know; that on a day named, (about a month before the commencement of the term), a subpæna was issued; that it was returned on the third day of the term, "not found;" and that, up to that time, affiant did not know but that said witness had returned, and had been served; "so affiant says that he has used due diligence to obtain the attendance of said witness," &c.

One conclusive objection to this affidavit is, that for aught that is shown, affiant knew of the intended departure or absence of the witness from the county, and took no steps to subporna him, or to take his deposition. It seems that he was aware of his absence, for he says: "that he did not know but that said witness had returned." He should have shown, either that he was not aware of the intended absence of the witness, or that he left expecting to be back in And these things should not be left to time for the trial. inference. Nor is it sufficient to state, that a party has used diligence to obtain the testimony. What has been done should be set forth, that the court may judge of the diligence. Brady v. Malone, 4 Iowa, 146; Widner v. Hunt, Ib., 355; Adams v. Peck, Ib., 551.

Appellant next insists that there was error in allowing certain interrogatories to be propounded and answered. The record fails to show what answers were given to these interrogatories; and under the ruling made in Mays v. Deaver, 1 Iowa, 216, it becomes unnecessary to inquire into the correctness or incorrectness of the questions themselves. The material inquiry is not, whether an improper question was asked, but was improper and illegal testimony received by the answer. Until the answer is disclosed, this cannot be known.

The defendant asked the court to instruct the jury as follows, which instruction was refused as asked, but given with the qualification as shown by the words inclosed in brackets: "That in determining the question as to whether or not there was a promise by defendant to marry plaintiff, they must not take into consideration any declarations made by, or conduct of, the plaintiff, not in the presence of defendant, (unless they amount to admissions of an engagement between them); that the evidence of plaintiff's declarations, and her conduct, not in the presence of defendant, were only admitted to show, in the discretion of the jury, a promise or assent on her part, and should be considered by the jury for this purpose alone; and that they are not to be considered at all, unless they first find that there was a promise made by defendant to marry plaintiff."

It is somewhat difficult to perceive the precise object or purpose of the qualification, as it is termed, added by the court. The objection to it, if any, is, that it might possibly tend to mislead the jury; and if so, it occurs to us that it would, in this respect, be to the plaintiff's, and not to the defendant's, prejudice. A contract of this kind, like all others, must be reciprocal and mutually obligatory upon the parties. To maintain the action, plaintiff is required to prove the defendant's promise. Not necessarily an express promise, it is true; for it may be shown, also, by the unequivocal conduct of the parties, and by a general, vet definite and reciprocal understanding between them, their friends and relations, evinced and corroborated by their actions, that a marriage was to take place. Chitty on Con., 536; Daniel v. Bowles, 3 C. & P., 553; 1 Blackstone Com., 433. Where the defendant's promise is once shown, then it may be proved that plaintiff demeaned herself as if she concurred in, and approved of, his promise, and thus establish the promise on her part; and this, whether the defendant is present or not at the time of such conduct. ard v. Rexford, 6 Cow., 254; Wightman v. Coats, 15 Mass., 1; Chitty on Con., supra. Vol. VIII.—21

Digitized by Google

This instruction recognizes these rules, and under one construction, might reasonably mean, that after his promise was proved, her concurrence in, and approval thereof, could be shown by no declarations or conduct of hers, unless they amounted to admissions of an engagement between them. If it was thus understood, then it was manifest to the plaintiff's prejudice, for after proof of his promise, her conduct and declarations might be proved, though they might not amount to an admission of an engagement. If, on the other hand, it be claimed that the true construction is, that in determining whether he had promised, the jury could not consider any conduct or declarations of hers, unless they amounted to admissions of an engagement between them, and that if they did amount to such an admission, they could be received to prove his promise—we say, if this is the claim, then it may be answered that other instructions clearly show that this was not the intention, and that it is not probable that the jury so understood it. In the first place, the latter part of the instruction itself negatives such a construction; for the jury are given to understand that her declarations, though amounting to such an admission, are not to be received except for the purpose of proving her promise, and they are not to be considered, unless there was a promise made by defendant. Not only so, but the jury are elsewhere told that the promise of defendant to marry plaintiff, being shown by direct or circumstantial evidence, then the demeanor and deportment of plaintiff may be given in evidence to prove her promise; and that a promise may be inferred from defendant's visits, and his declarations that he promised to marry her. From these and other instructions. we think it reasonably manifest that the jury could not have understood the instruction complained of, as appellant insists The fair deduction from all that was said to them is, that they were first to find that defendant made the promise, and that if they did not find this promise proved, that was an end of the case; but that if they found this fact, her conduct, declarations and deportment might be considered,

Veiths v. Hagge.

for the purpose of ascertaining whether she concurred in, or reciprocated his promise, but not for the purpose of proving the promise of defendant.

Other errors are assigned, but not argued. The foregoing considerations cover the substance of the case, and the judgment is therefore affirmed.

VEITHS v. HAGGE.

While objections to the competency of a witness should, in general, be taken before he is examined in chief, yet they may be made at any time during the trial, if made as soon as the interest or incompetency of the witness is discovered.

If the incompetency of a witness is first discovered during the examination in chief, it is not too late then to object to him on the ground of incompetency.

The fact that a bond for the delivery of property attached in the suit, is filed with the papers in a cause, upon which a witness is surety, is not such notice of the interest of the witness as will preclude the party against whom he is called, from objecting to the witness on the ground of incompetency, after he has been sworn, and examined in chief, in part.

Where it is the custom of a creditor, known and acquiesced in by the debtor, to charge interest on accounts, after a certain time, or where such is the uniform usage of the trade, such facts, if proved, are evidence of an agreement, and interest will be allowed.

Where in an action on account for goods sold and delivered, the party claimed interest on the account from the end of the year during which the same accrued, and offered to prove, that by the usage and mode of dealing between him and his customers, having open accounts, all such accounts were considered due at the end of the year, and interest on the same from that time, was charged to his customers, and that such custom was known to the defendant, which evidence was rejected by the court; Held, That the evidence was admissible; and that it should have been left to the jury to determine, whether the facts shown amounted to an agreement between the parties, that the account was to be considered due at the end of the year, and that interest was to be charged after that time.

A charge for "money paid" or "money lent" in an account, cannot be proved by the books of accounts of the party making the charge.



Veiths v. Hagge.

The paying out or loaning of money, is not usually the subject of a charge in an account; and charges of that nature are not such as are made in the ordinary course of business by one party against another.

Where in an action on an account for goods sold and delivered, which contained charges of money lent, the party proved by a witness, that the defendant was a customer at the store of the plaintiff, and was in the habit of borrowing, from time to time, sums of money from the plaintiff, which were charged to the defendant in his account; Held, That while the evidence might show a course of business between the parties, it was not sufficient to constitute the plaintiff's books of account legitimate evidence of money paid or lent to the defendant.

Section 2406 of the Code has not made any such distinction, as that small sums of money may be proved by a party's books of account, but that large sums shall not be so proved.

But the books may more readily be admitted as sufficient to prove the payment of money of small than a large amount, and it may be more readily concluded that the loan or payment of small sums of money, by a retail trader to his customers, and charged in their accounts, was more nearly in the ordinary course of business, than the loan or payment of large sums; and if the jury should be of opinion, that small money charges were legitimately made in the ordinary course of business, they may allow the same.

Where a party against whom entries are made in books of account, or against whom an account is rendered, relies upon or seeks to avail himself of credits entered in his favor, he will not be allowed to do so, without, at the same time, making the whole account evidence against himself.

A party seeking to have the benefit of an admission or declaration of another, must take the whole admission or declaration together, and will not be allowed to select what makes in his favor, and exclude that which makes against him.

Where in an action on an account, which contained charges for money lent, and in which certain credits were given to the defendant, the defendant offered no evidence of payments made by him, and the plaintiff asked the court to instruct the jury as follows: "That if the defendant claimed the benefit of the credits given him by the plaintiff, on his account, on the books of account of the plaintiff, he thereby made said books and accounts evidence to go to the jury, and to be considered by them, in support of all the items charged against the defendant therein, including the cash items, subject to be rebutted as to any of such items by counter evideence on the part of the defendant; and that the defendant could not claim the benefit of the items credited to him on said account, and at the same time, exclude from the consideration of the jury any of the items charged against him in the same account;" Held, That the court erred in refusing to give the instruction.

Where in an action commenced by attachment, on the ground that the de-

Veiths v. Hagge.

fendant had property, &c., not exempt from execution, which he refused to give, either in payment or security of the debt, the defendant claimed damages of the plaintiff, by way of set-off, for the wrongful suing out of the attachment, denying the causes alleged in the affidavit for the writ, and averring that the attachment was wrongfully sued out; and where on the trial, the plaintiff, offered no evidence to prove that the defendant had property, &c., or that payment or security had ever been demanded, and refused by the defendant, and thereupon the defendant asked the court to instruct the jury, "that the burden of proof was on the plaintiff, under the issue joined, to show such demand and refusal," which instruction the court refused to give; Held, That the instruction was properly refused.

In an action on an attachment bond, for wrongfully suing out an attachment, the burden of proof is upon the plaintiff, to show that the writ was wrongfully sued out; and where the attachment was issued on the ground that the defendant in the writ had property, &c., which he refused to give either in payment or security of the debt, and he relies upon the fact that no demand was ever made upon him for such payment or security, and that there was, consequently, no refusal, he must prove it.

The true test to determine where is the burden of proof, is to consider which party would be entitled to the verdict, if no evidence were offered on either side; for the burden of proof lies on the party against whom, in such case, the verdict ought to be given.

A party injured by the wrongful suing out of a writ of attachment, has no other remedy for his injury, than an action on the attachment bond, unless the case is such that an action of trespass would lie.

The law has made no provision for any issue or proceeding to try the truth of the facts averred in a petition or affidavit for a writ of attachment. nor for the dissolution of the writ, upon its being ascertained that the said averments are not true, and that the writ was wrongfully issued, even though the same should be made to appear from the verdict of a jury.

Where in an action commenced by attachment, in which the defendant claimed damages of the plaintiff, by way of cross-action, for the wrongful suing out of the attachment, the jury found for the plaintiff on his cause of action, and rendered a special verdict, that the attachment was wrongfully sued out, assessing the damages of the defendant therefor, at ten dollars; and where the defendant then moved the court for a judgment on said special verdict, quashing the writ of attachment, which motion was refused, and judgment rendered for the plaintiff. Held, That the motion to quash the attachment was properly overruled.

Appeal from the Scott District Court.

SATURDAY, APRIL 9.

This was an action upon a promissory note for \$1,050, commenced by attachment, on the ground that the defendant had property, goods, or money, lands and tenements, or choses in action, not exempt from execution, which he refused to give either in payment or security of the said debt. An attachment was duly issued, and levied on certain goods, wares and merchandize in the store of the defendant, who executed a bond for the delivery of the property or the payment of its estimated value, within twenty days after the rendition of judgment in said suit. This bond was signed by one William Stolley, as one of the sureties of the defendant.

The answer of the defendant admitted the execution of the note, but denied that he was indebted to the plaintiff, and claimed, as a set-off, the sum of \$567,42, for goods sold and delivered, money lent, &c., with interest-an account of which was attached to the answer. The answer, also, claimed a sum of \$2,000 as damages, for the wrongful suing out of the said attachment, averring that the said defendant, at the time of suing out said writ, had no property, goods or money, lands and tenements, or choses in action, not exempt from execution, which he refused to give in payment or security, for any debt justly due from him to the plaintiff; that there was due from the defendant to the plaintiff, at the time of commencing the action, no more than the balance remaining after deducting from the amount of the note, the amount due from the plaintiff to the defendant, on the accounts set out in the answer; that the defendant never refused to pay said balance to the plaintiff, but was always, before the commencement of this action, ready and willing, and repeatedly offered to pay the same to the plaintiff; and that the said attachment was wrongfully sued out by the said plaintiff. Among the items charged in the accounts attached to the answer, were "Cash, \$100." "To check to Chubb, the following: Bro., Barrow & Co., \$146,00;" and in the same accounts. the plaintiff was credited with various sums.

The replication denied that the plaintiff was indebted to the defendant in the sum claimed on the said accounts, admitted the suing out of the attachment, and the execution of the attachment bond; and denied that the attachment was wrongfully issued, or that defendant was damaged thereby.

Upon the trial of the cause, before a jury, the defendant to sustain the issues on his part, called as a witness the said William Stolley, who was sworn in chief, and examined in part on behalf of defendant, without any objection on the part of the plaintiff. While the examination in chief of said witness was in progress, and unfinished, the attorney for the plaintiff interposed, and put to the said witness the following ques-"Have you any interest in this suit?"—to which question objection was made, as improper at that stage of the proceeding, but the objection was overruled, and the witness permitted to answer, to which ruling the defendant ex-In answer to the interrogatory, the witness stated: "I do not know that I have any interest, except that I am on the delivery bond to the sheriff." The delivery bond was filed with, and attached to, the writ of attachment, as a part of the sheriff's return. The attorney for the plaintiff thereupon objected to the further examination of the witness. on the ground that he was incompetent, by reason of interest, which objection was sustained, and the witness excluded -to which ruling the defendant excepted.

In the further progress of the cause, the defendant, in order to sustain the charges for interest contained in the accounts, having proved that he kept a retail store, at which the laintiff was a customer, and bought goods from time to time, on credit, and had a running account at said store, in which said purchases were charged to him—which account was the one in suit—offered to prove that by the uniform usage and mode of dealing between defendant and his customers, having running accounts at said store, all said accounts were considered as due at the end of the year, and that interest was charged by the defendant, on the unpaid balances of the said accounts from the said end of the year;

and that said usage and mode of dealing was known to the plaintiff at the time when he was a customer of the defendant. This evidence was objected to by the plaintiff, and the objection being sustained, the defendant excepted.

The defendant, in order to prove the accounts against the plaintiff, produced in evidence his books of account, having first introduced the necessary preliminary evidence in verification of said books; and also called as a witness one Heinrich Jensen, who testified that he was employed as a clerk in the store of defendant, from the first of March, 1855, to the first of March, 1856, and that plaintiff, during that time, was a customer at said store, and was in the habit of borrowing sums of money from defendant, which were charged to him on the said books of account. The bill of exceptions then recites, that the defendant offered no evidence independent of said books, in support of the specific items of cash charged against the plaintiff in the accounts; and that the plaintiff offered no independent evidence on his part, to prove any payments made by him to the defendant, but relied, in order to establish the same, on the credits given him for such payments, upon the accounts offered in set-off, and the said books of account.

The bill of exceptions further recites, that no evidence was offered by the plaintiff, to prove that the defendant, at the time of commencing the action, had any property not exempt from execution, which he had refused to give in payment or security of the plaintiff's claim, as alleged in the petition; nor was there any evidence produced that the plaintiff had ever demanded such payment or security, or that the defendant had ever refused to give the same.

The court instructed the jury as follows: "That cash, except in small items, to the amount of ten dollars, or thereabouts, which appear to have been furnished in the ordinary course of dealing between the parties, is not the subject of book account, and cannot be proved by the books of account alone. But to entitle the defendant to recover for such items, there must be other evidence than what the books furnish.

If there is evidence other than the books, that the money was loaned to the plaintiff, items of such a character the jury will allow."

To the giving of this instruction, the defendant excepted, and thereupon he asked the court to instruct the jury as follows: "That if the plaintiff claimed the benefit of the credits given on his account, on the books of account, and on the accounts set forth in the answer, he thereby made said books and accounts, evidence to go to the jury, and be considered by them, in support of all of the items charged against the plaintiff therein, including the cash items, subject to be rebutted as to any of such items, by counter evidence on the part of the plaintiff; and that the plaintiff could not claim the benefit of the items credited to him on said account, and at the same time, exclude from the consideration of the jury, any of the items charged against him in the same account."

This instruction the court declined to give, but instructed the jury as follows: "That the plaintiff would be entitled to all credits, and all acknowledgments of indebtedness to him, made upon the defendant's books, if he chose to avail But that if, upon an examination himself of such credits. of the debits and credits, and all the other evidence in the case, the jury believe that plaintiff delivered property to defendant, and defendant at the same time, paid over the amount, or a part of it, for which he purchased said property, and the purchase of the property and the payment for it, was one and the same transaction, the jury may balance one against the other. But where, on an examination of the books, and the other evidence in the case, there are cash items charged in the defendant's account against the plaintiff, exceeding ten dollars, which do not appear to have been made in payment of the credits, and there is no other evidence than the books, that said cash was delivered to, and received by, the plaintiff, then the jury will disallow such items." To the instruction thus given, and the refusal to give that asked by him, the defendant then excepted.

Vol. VIII. -22

On the issue in relation to suing out the attachment, the defendant asked the court to instruct the jury as follows: "That the burden of proof was on the plaintiff, under the issue joined, to prove a demand of property in payment or security of the said debt, and a refusal on the part of said defendant." This instruction the court refused to give, and thereupon it instructed the jury as follows: the plaintiff having taken the course prescribed by law, to obtain an attachment, the jury must be satisfied that the defendant has established the fact that the attachment was wrongfully sued out—that is, that it was sued out unjustly. injuriously, tortuously, and in violation of right-before they can allow the defendant damages for the wrongful suing out of the same." To the giving of this instruction, and the refusal to give that asked by the defendant, he excepted.

The jary returned a verdict as follows: "We, the ju rors, find a verdict for the plaintiff in the sum of \$892,39. We likewise are of the opinion, that the attachment was wrongfully issued, and therefore think the defendant entitled to damages to the amount of ten dollars, to be deducted from the above sum;" and thereupon the defendant moved that a judgment be rendered upon the verdict of the jury, that the writ of attachment be vacated and set aside, which motion was overruled, and judgment was rendered in favor of the plaintiff for the amount of the verdict, less the damages awarded to the defendant. The defendant appeals, assigning as error the various rulings of the court.

J. N. Rogers, for the appellant.

- I. The court erred in denying defendant's motion to quash the attachment.
- 1. It being judicially ascertained by a verdict, on an issue regularly joined in the case, directly on the point, that the attachment was wrongfully sued out, it became the duty of the court to quash it. The court will not per-

mit the plaintiff to reap any advantage of his tortuous act. Otherwise, plaintiff would be allowed to "take advantage of his own wrong," and to abuse the process of law. record will then show on its face, an attachment wrongfully sued out, and a judgment giving the full benefit of it to the wrongdoer; the damages being merely nominal. recovery of damages by defendant for the wrongful suing out of the attachment, is no answer to the motion to quash the attachment. The plaintiff cannot thus purchase a right to retain an attachment, wrongfully sued out. In contemplation of law, the damages are merely a remuneration to defendant for the injury he has already sustained, from the wrongful act of plaintiff in fraud of his rights. 3. If his property has been taken out of his possession under the attachment, he recovers his loss by reason of the detention, Drake on Attachments, sections 170-184. If not so taken, (as in this case), he gets, ordinarily, but nominal dam-Such recovery confers on plaintiff no right to the attachment, nor to any future benefit from it. not thus make merchandise of the process of law. court has rights and duties in the matter. It is its duty to see that its process is not abused. It is against the whole policy of the law, to allow a party to retain, for any purpose, a writ wrongfully sued out. 3. When a merchant's stock of goods is attached, he must either give a delivery bond, or have his business broken up, and his credit ruined. According to the ruling in this case, his creditor can, in such case, subjecting himself to only nominal damages, sue out an attachment without any real grounds, compel defendant to give bonds, and obtain the full benefit of the bond, and of recourse against the sureties. 4. Other parties than defendant may be injuriously affected by refusal to quash attachment. It may enable a creditor to gain an unfair advantage over other creditors. Subsequent purchasers, incumbrancers, or lien-holders, may be prejudiced. Sureties on the delivery bond have a right to be protected from liability in such case. 5. Our position in no way con-

flicts with the decision in Sackett v. Partridge, 4 Iowa, 416, that defendant cannot traverse the allegations for an attach-Such traverse raises an immaterial issue, because it determines nothing as to the right of action, and because it ignores the question of probable cause. In this case, the verdict, (under an instruction sufficiently favorable to plaintiff), establishes the want of probable cause. The decision in Sackett v. Partridge, does not decide that there is no mode of defeating an attachment, where the proceedings to obtain it are regular on their face. It only decides that it cannot be done by traversing the allegations in the petition on which it was sued out, because nothing in the petition is traversable, which does not go to the cause of action. For a like reason, a defect in such allegation, is not demurrable. Hart v. Collins, 4 Iowa, 56. The remedy is pointed out by the court in the case last cited, viz: a motion to quash. It is submitted that this remedy is equally applicable, when the writ was wrongfully sued out, though the proceedings are regular on their face, and that if it were made clearly to appear on affidavits, that there was no ground in fact, for suing out the writ, a motion to quash would be sustained. Much more should it be sustained, when a jury, after a fair trial, on an issue regularly joined on the point, under instructions not complained of by plaintiff, have found that there was not even probable cause for suing it out, and that verdict is not even asked to be set aside by plaintiff. Courts of other states permit a defendant to defeat an attachment wrongfully obtained, by motion, independently of statute. Drake on Attachment, ch. 15; Ib., secs. 292, 293. The repeal of the former statutes of this state, authorizing defendant to traverse allegations for an attachment, merely abrogates that method of proceeding, and does not interfere with the right to quash on motion. 6. The court below denied the motion to quash the attachment, on the broad ground that there is no mode of defeating an attachment wrongfully sued out, when the proceedings to obtain it are regular upon their face; and that the

defendant has in such case, no remedy but damages upon the bond. That this is entirely contrary to the whole course of adjudication in other states, where, as with us, an attachment does not issue as a matter of course, on commencing an action, will be seen by reference to Drake on Attachment, ch. 15, where the practice in the different states is stated; by which it will appear that when the matter is not regulated by statute, (which, in several states, expressly points out the mode of defeating such an attachment), the courts generally recognize the right of defendant to have the attachment set aside on showing that it was improperly issued, by extrinsic evidence, either on motion, based on affidavits, or by plea in abatement. It is submitted, that to deny the defendant this right, is not only unjust to him, but offers a premium to perjury, (or very loose swearing), on the part of the plaintiff, by allowing him, if he chooses to make the affidavit provided by the law, to obtain an attachment, and hold it, and reap the fruits of it, only subjecting himself to the very moderate risk, (practically), that defendant, (whose property and means for carrying on a protracted and severely contested litigation, have probably been all taken from him by the attachment), will sue him on the bond, and succeed in sustaining the heavy burden imposed on him in such an action. by the decisions of this court, namely, that of showing want of probable cause. It is submitted that the doctrine established by this court in Mahnke v. Damon, 3 Iowa, 107, that in an action on an attachment bond, plaintiff must allege and prove a want of probable cause, is in itself a strong argument against the decision of the district court in this case. confining defendant to damages on the bond; since the two doctrines, taken together, almost guarantee impunity to a plaintiff, in wrongfully suing out an attachment. question left undecided in Sackett v. Partridge, whether a claim for damages on the attachment bond, can properly be pleaded in set-off in the attachment suit itself, is not before the court in this case. Since the Code, (section 1854), authorizes suit on the bond before the termination of

the attachment suit, it would seem that under section 1740 of the Code, relative to set-off, there can be no objection to such a set-off, when, (as in this case), the attachment was sued out immediately on commencing the suit. The right off action on the bond, vests immediately, at least for nominal damages, or at all events, "it is a claim held by defendant," (if not matured), "at the time the suit was commenced." But the merely technical objection to a set-off, that it had not accrued when the suit was commenced, is clearly one which a plaintiff can wave, and does waive, by failing to demur, and pleading over on the merits, and the plaintiff, in this case, by taking this course, has precluded himself from ever raising the objection that such a set-off is not allowable.

II. The court erred in excluding the witness, Stolley, on the ground of interest. This objection is not to be favored, and it was taken too late. The bond which rendered him incompetent was part of the record, and plaintiff either knew, or had the means of knowing it, when he was called as a witness. 1 Greenleaf's Ev., sec. 421; Donelson v. Taylor, 8 Pick., 390; Shurtleff v. Willard, 19 Pick., 202.

III. The court erred in excluding the evidence offered by defendant, as to charges for interest. The statute enacting that interest on open accounts, shall run from six months after the date of the last item, (Stat. 1852, ch. 37, 67), only applies where there is no contract about interest between the parties. It was meant for the benefit of the creditor, not to restrict his rights. A known and uniform usage, such as was offered to be proved by defendant, is evidence of such a contract, and binding on the parties. Selleck v. French, 1 Am. Lead. Cases, 494, and cases cited; Easterly v. Cole, 3 Comstock, 502.

IV. The court erred in instructing the jury, that the defendant's books were not evidence of cash items, except in sums not greater than ten dollars, charged against plaintiff therein. This may be so at common law, though the authorities are not perfectly uniform. 1 Smith Lead. Cases.

Notes to *Price* v. *Torrington*. In this state, the subject is regulated by statute. The Code, (section 2406), prescribes that the entries must be "in the ordinary course of business." This means, the ordinary course of business between the parties to the suit, and defendant proved by the witness, Jensen, that plaintiff was in the habit of borrowing sums of money from defendant from time to time, which were charged to him on the books. The entries being thus proved to have been made "in the ordinary course of business," were competent evidence to prove the items.

The court erred in refusing to instruct the jury as requested by defendant, that plaintiff could not claim the benefit of credits given him on defendant's account and books, without thereby making the whole of the debits, evidence to go to the jury. The importance of this ruling arises from the fact, that there are a number of cash items charged in defendant's account against plaintiff—two for \$100 each, one for \$146, and several for smaller sums. This is a case falling under the general rule, that if one party seeks the benefit of an admission or declaration of the other, whether oral or written, he must take the whole of it together. He cannot exclude that part which makes against him. 1 Greenl. Ev., sec. 201; Code, section 2399. The items of credit are not unqualified and isolated admissions of payment; but they are admissions of payments as made on a particular account, i. e., on one made up of all the items on the debit side. They cannot, with justice to defendant, be separated from Defendant is not to be prejudiced by having, that account. as in fairness he was bound to do, set out both sides of the If he had set forth only the debit side, he would have driven plaintiff to independent proof of his payments on the account, and thus, probably, driven him to, himself, put in evidence defendant's books. He cannot be put in a worse situation, than if he had taken that course. The point is fully sustained by the following cases: Morris v. Hurst, 1 Wash. C. C., 433; Bell v. Davidson, 3 Ib., 328; King v. Madox's Ex'r, 7 Har. & J., 467; Walden v. Sherburne, 15

Johns., 409; Jones v. Jones, 4 Hen. & Munf., 447; Waggoner v. Gray's Adm'r, 2 Ib., 603; Wakeman v. Marquand, 5 Martin, (Lou.,) (N. S.), 265; Jacobs v. Farrall, 2 Hawks., 570; Cow. & Hill's notes to Phillip on Ev., Part 1, 344; Randle v. Blackburne, 5 Taunton, 245.

The court erred in refusing to rule, that the burden was on plaintiff to prove demand, and refusal of payment or security by defendant, and in ruling that the burden was on defendant to prove the negative—that there had been no demand, or refusal. Whether there had been such demand or refusal, was, (like the existence of his own claim against the defendant), a fact within plaintiff's knowledge, without which, there could have been no probable cause for suing out the attachment. 1 Greenl. Ev., secs. 74, 79; Porter v. Wilson, 4 G. Greene, 314. It would be impossible for defendant to prove negatively, that he had never refused. require him to do so, is, in effect, to render it impossible to sustain an action on an attachment bond, where the attachment was sued out on an allegation like that in the present case.

J. W. Stewart, for the appellee.

- I. The motion to vacate the attachment, made after the verdict, and rendition of judgment thereon, was properly overruled.
- 1. Defects in the pleadings of the plaintiff in attachments, which are fatal to an attachment, are of a preliminary character, and may consist, either in a defective statement of the allegations stating the cause for the issuance of the writ; or where the writ issued is informal on its face; or where no bond, or a defective bond, has been filed. In any of which cases, a motion to quash and vacate the attachment lies. Motions to quash an attachment, are based on defects apparent on the face of the proceedings, and on the hearing of such a motion, nothing will be considered but what is thus apparent. Drake on Attachments, section 384. In the

case at bar, no such objections were raised, and the defendant below having joined issue with the plaintiff on the merits, and gone to the jury, and having elected to claim damages in an action in set-off on the attachment bond, after the verdict of the jury, and the rendition of judgment thereon, the motion to quash the writ by defendant below, comes too late.

If the petition praying for the writ, or the bond, were in any respect defective, defendant below, before issue joined and trial on the merits, should have moved to quash the writ and attachment lien. The courts will not suffer, nor permit the defendant, after having made his election, and brought suit on the attachment bond filed for his benefit, in case of failure to recover damages thereon-or, as in the case at bar, recovering merely nominal damages—to repudiate his election, and fall thence back on the writ, and on a motion merely, quash the attachment, and vacate the attachment lien; that is, having claimed damages for the wrongful suing out of the writ, by a suit on the bond, and having failed in recovering damages thereon, he is estopped thenceforth in setting up any plea which will impair or destroy the writ, or the attachment lien. He has, by his previous plea of record, availed himself of all the benefits accruing to him in the way of damages, by suit on the bond, and has acknowledged the legal existence and continuance of the lien, and the defendant below is bound thereby, and the courts, in such cases, will not allow the rights of the attaching and judgment creditor, to be thus periled, but will protect him in the enjoyment of the fruits of the execution, levied on the property under the attachment lien.

2. A motion to quash an attachment, is addressed to the discretion of the court, and may be acted on, or declined at pleasure; and this discretion will not be controlled by mandamus; or revised by an appellate court on error. Drake on Attachment, section 386; Ex parte Putnam, 20 Ala., 592; Reynold v. Bell, 3 Ib., 57; Massey v. Walker, 8 Ib., 167; Elison et al. v. Mounts, 12 Ib., 472. The statutory Vol. VIII.—23

provisions regulating attachments in the state of Alabama, are, in the main, identical, with those of Iowa—hence the decisions of that state on this point, are good authority in this court. Drake on Attachment, section 12.

- By Rev. Stat. of Iowa, 1843, 78, the allegations in an affidavit for an attachment, were traversable. Code, (chap. 109), changes the practice in this respect, and in all cases, the "proceedings relative to the attachment, are to be deemed independent of the ordinary proceedings, and only auxiliary thereto." Code, section 1847. This court has also decided, that under the practice existing under the Code, the allegations for an attachment, are not, in the main suit, Sackett, Belcher & Co. v. Partridge & Cook, traversable. This court having decided, that such issues 4 Iowa, 416. only can be made in an independent action on the attachment bond, it is respectfully submitted, that this issue cannot, in this case, be made by set-off, as was attempted in the trial below.
- II. Did the court err in excluding the testimony of witness Stolley? The case in 8 Pick., 390, cited by appellant, is not in point, as the testimony of the witness was not offered to the jury, but to the court, to lay the foundation for the introduction of secondary evidence. The case in 19 Pick., 202, cited by appellant, is good authority to sustain the ruling of the court below on this point. See same case, page 212. So, also, is the authority in 1 Greenl. on Ev., sec. 421. The rule formerly observed, of requiring objections to be made to the competency of a witness only on his voire dire, is now, by all our courts, very much relaxed, and a more liberal practice, which looks to the merits and justice of the case, rather than to technical rules, now prevails. Shurtleff v. Willard. 19 Pick., 212. The objection to the competency of a witness, can be taken at any stage of the trial, when discovered; indeed, if the disqualification did not come to the knowledge of the party till after the trial, it would, if of sufficient importance, be a good ground for granting a new trial. Shurtleff v. Willard, 19 Pick., 212; 1 Greenl. on Ev., sec. 421;

1 Stark. Ev., 121, and cases cited. The objection to the witness Stolley, he having testified only in part, did not come too late, it being urged as soon as discovered. *Turner* v. *Pearte*, 1 T. R., 719; 1 Phil. Ev. (6th ed.), 121.

Did the court err in excluding evidence offered by defendant, to show a local usage in his store, among defendant's customers, in reference to interest on open accounts? In this case no testimony was offered to prove a contract between the parties, to pay interest. It is not claimed that there was any contract. In the absence of an express contract to pay interest, in cases of money due on open account, the Code (sec. 945, and session laws of 1853, ch. 37, sec. 1), determines the rate of interest. A custom is a usage which has acquired the force of law; it derives its binding authority from the tacit consent of the legislature and the people; it follows, therefore, that there can be no custom in relation to a matter regulated by statute. 1 Bouv. Inst., 51. To make a good custom it must be public, peaceable, uniform, general, continued, reasonable, and certain, and it must have continued for a "time whereof the memory of man runneth not to the contrary." 1 Bouv. Inst., 51; 1 Wend. Bl. Com., 75. The usage or custom of no class of citizens can be sustained in opposition to principles of law. Homer v. Dorr, 19 Mass., 28.

IV. It was a right of the plaintiff below to avail himself of the credits given him by defendant, in his books and account, without reference to the debits of defendant's account, or off-set. This does not fall under the general rule of claiming the benefit of admissions of his adversary, where the whole admission must be taken together. That rule applies to cases where the party wishing the benefit of admissions made, introduces the admissions himself, as testimony in the case; in all which cases the party using and introducing such admissions in evidence, is bound by the whole of it, as well what operates for as against him. The plaintiff below did not seek, nor ask, for either said debits or credits, nor call on defendant below to produce them. They were no

part of plaintiff's cause of action, and defendant below, having, on his own motion, given said credits to the plaintiff, if the defendant below fails to prove the whole of his off-set, and the plaintiff avails himself of the said credits, the defendant is estopped thereafter, from interposing objections, and must abide the consequences of his voluntary acts.

V. Was the burden of proof on plaintiff to show, on the trial, demand and refusal of payment or security? The court ruled that the plaintiff, having conformed to the prerequisites of the statute, and obtained a writ of attachment, "the jury must be satisfied that the defendant has established the fact, that the writ was unjustly, injuriously and tortiously sued out, before they can allow damages to defendant, for the wrongful suing out of the same." This ruling of the court was in strict compliance with the statute regulating attachments. When a party has observed all the conditions precedent necessary to obtain a writ of attachment, and the writ is issued, and property attached under and by virtue of the writ, it is a right which the law gives to the attaching creditor, to have and to hold his lien on the property under attachment, and that the specific property thus held should be applied to extinguish the judgment obtained thereon. And if, in any case, the writ is wrongfully issued, the remedy of the defendant is, not to quash and vacate the writ, and extinguish the lien, but in an action on the bond, to recover damages; that is to say, the attaching creditor having taken the course prescribed by law, and having obtained a writ of attachment, and attached property of the debtor, not exempt from execution, and properly subject to the attachment, the property must abide the final order of the court in the premises, and it, or its estimated value, (if a delivery bond has been taken), must invariably be forthcoming, to satisfy, either in whole or in part, the judgment obtained, subject, however, to this one exceptionif the attaching creditor has abused the power given him by the statute, and wrongfully sued out the writ—that he pay all damages the defendant has sustained by the abuse of the

power given him by the statute, in the unjust, improper and tortious use of the writ.

The allegations asking for an attachment in the petition, this court have already ruled, were not traversable on the pendency and trial of the principal suit. 4 Iowa, 416. Such an issue can only be raised in an action on the attachment Now, whether this issue is made in an independent action on the bond, or in an action for damages on the bond, by way of set-off to the main suit pending, is immaterial; the issue, in both instances, is the same, and that issue is, was the writ wrongfully issued? The defendant having averred that it was, and the plaintiff having joined issue with him thereon, it was for the defendant to show, or to make out, at least, a prima facie cause to the jury, that the writ was wrongfully sued out, before the plaintiff could be called on to make defense to the matters and things alleged by defendant in his suit for damages on the bond. Hence, the ruling of the court in this case, that the burden of proof was on the defendant; that the plaintiff, having complied with the provisions of the statute, had obtained his writ, and was entitled, therefore, to all the benefits to be derived therefrom; and the defendant, having elected to bring his action in set-off on the bond, the defendant, before he could recover damages thereon, must make it appear affirmatively-or, at least, a prima facie appearance—that plaintiff had sued out the writ unjustly, injuriously and tortiously, as a condition precedent to his recovery of damages.

STOCKTON, J.—1. We think there was no substantial prejudice to the rights of the defendant, in the permission given by the court to the plaintiff, to interrupt the examination in chief of the witness, Stolley, to enable the plaintiff to ask him whether he had any interest in the suit. Objection to the competency of a witness should, in general, be taken before he is examined in chief. There is no objection, however, to its being taken at any time during the trial, provided it is taken as soon as the interest is discovered. If

discovered during the examination in chief, it is not too late to make the objection. 1 Greenleaf Ev., section 421. There is nothing to show that the interest of the witness was known to the plaintiff, until it was disclosed, upon his examination, that he was surety in the delivery bond given for the property of defendant attached in the suit. The fact that the bond was on file among the papers of the suit was not, of itself, sufficient to bring the matter to the notice of the plaintiff. That the witness was incompetent by reason of the security given by him, does not seem to be contested by the defendant.

2. The defendant claimed to be allowed interest on his open account against the plaintiff, from the end of the year during which the same accrued; and offered to prove that by the usage and mode of dealing between him and his customers, having open accounts, all such accounts were considered due at the end of the year; that interest on the same from that time was charged by defendant to his customers; and that such custom was known to plaintiff. The court refused to receive the evidence.

When money is due by agreement, at a particular time, interest may be charged after that time; or when there is a settlement of matured accounts, interest is chargeable from the time the balance is ascertained. But where there is an open account, interest on the same can only be charged after six months from the date of the last item. tion 945; Acts 1853, 67. If the defendant is entitled to charge interest on his account in this instance, he can only be so entitled on the ground that the plaintiff kept an open account with defendant, knowing his usage and mode of dealing with his customers; and that this fact amounted to an implied agreement, at least, to pay interest on the account after the end of the year. If it be the creditor's custom, known and acquiesced in by the debtor, to charge interest, or if such be the uniform usage of the trade, such facts, if proved, are evidence of an agreement, and interest will be allowed. Meech v. Smith, 7 Wend., 315, 318; Eas-

terly v. Cole, 1 Barbour, 236; same v. same, 3 Comstock, 502; Williams v. Craig, 1 Dallas, 313. The evidence offered, we think, should have been admitted, and it should have been left to the jury to determine whether, the facts shown amounted to an agreement between the parties that the account was to be considered due at the end of the year, and that interest was to be charged after that time.

The account pleaded by the defendant, by way of set-off to the plaintiff's action, commenced in April, 1855. and continued up to December, 1856. It contained, among others, several items charged against plaintiff, as "cash \$100." and "cash \$146." The defendant, after having produced the necessary preliminary evidence in verification of his books of account; and after having proved by one Jensen, who was his clerk from March, 1855, to March, 1856, that plaintiff during that time was a customer of defendant. and in the habit of borrowing sums of money of defendant, from time to time, which were charged to him in said books of account, without offering any other evidence in support of said cash items charged to plaintiff, offered to prove the same by the said books. The court charged the jury that "cash, except in small items, to the amount of ten dollars or thereabouts, which appear to have been furnished in the ordinary course of dealing between the parties, is not the subject of book account, and cannot be proved by the books alone. But to entitle the defendant to recover for such items, there must be other evidence than what the books furnish. If there is evidence other than the books. that the money was loaned to the plaintiff, items of such character the jury will allow."

When the preliminary proof is made, as required by the Code, (section 2406), the admissibility of the books of account, is a question for the court; the degree of credit to be given to them, after they are introduced, is to be determined by the jury. They are admissible to prove charges by one party against another, made in the ordinary course of business, and for no other purpose. The question whether the

charges, sought to be proved by the books, are made in the "ordinary course of business," may oftentimes be difficult It has been held that the books of acof determination. count of a farmer or planter, are not evidence to prove a sale and delivery of articles; for such transactions are not in the usual course of business of farmers. Jeter v. Martin, 2 Bevard, 156; and in Thayer v. Dean, 2 Hill, 677, the same court held that the memorandum books of a pedlar were inadmissible, because such persons usually do not deal on credit, and cannot conveniently keep books. "They do not fall within that class of persons, (say the court), in whose pursuit or employment, convenience, or the usage of the country, imposes the necessity of keeping books of account." So, it is held that the article sold must be in the line of the party's general business; and that the sale of a horse could not be proved by an entry in the books of a drygoods merchant, or tradesman. Shoemaker v. Kellogg, 1 Jones. 310. If the entries appear to have been made out of the usual course of business, the books are to be rejected. Lynch v. M'Hugo, 1 Bay., 33. In Leveringe v. Dayton, 4 Washington, C. C., 698, the plaintiff's ledger was offered with a debit: "To duties, \$1602." The court rejected the evidence, not because the entry was in the ledger, but because it was a large charge of money paid on account, entered all at once, without appearing to be in the course of The party offering the books must prove what his ordinary business is; and the jury, under the direction of the court, are to allow or disallow the charges made, according to the credit they may attach to the books, and according as it may be determined whether the charges are or are not made in the ordinary course of business.

Upon the question of the admissibility of the party's book of entries for the purpose, and the extent to which it is allowable to prove by them the cash items in an account, the rule varies in the different states. In Massachusetts, Maine and New Hampshire, money charges may be proved by them to the extent of \$6 66, but not beyond. Union

Bank v. Knapp, 3 Pick., 109; Burns v. Fay, 14 Ib., 12; Prince v. Smith, 4 Mass., 455; Wetherell v. Swan, 32 Maine, 247; Richardson v. Emery, 3 Foster, 220; Bassett v. Spofford, 11 N. H, 169.

In Pennsylvania, the book of original entries, made by the party, and verified by his oath, is competent evidence of goods sold and delivered, and work done, and of the price, but not of money lent or paid. *Ducoign* v. *Schreppel*, 1 Yates, 347.

In South Carolina, the book of the party is evidence to prove the delivery of articles sold, or work done, and nothing more. St. Phillip's Church v. White, 2 McMullen, 312.

In Delaware, by statutory regulation, in an action for articles sold and delivered, and other matters properly chargeable in an account, the oath of a plaintiff, together with a book regularly and fairly kept, are declared to be sufficient in all cases to charge a defendant. Hall's Revised Laws, 89. But the courts have held that cash is not a matter properly chargeable in account. Smith v. M' Beath, cited in Harrington, 346.

In New York, in Case v. Potter, 8 Johnson, 211, the question of admissibility was not decided; but it was said by the court, that although a shop book might be admitted in case of a sale and delivery, yet the usage "can never apply to a charge for cash lent, but only to the regular entries of the party in the usual course of his business." In Vossbing v. Thayer, 12 Johnson, 461, the court say: that "books of account are not evidence of money lent, because such transactions are not, in the usual course of business, matters of book account."

In Illinois, the rule in New York has been adopted, and it is held, that upon the necessary and usual preliminary proof being made, in case of open account, composed of many items, the plaintiff's book of accounts is admissible; but that this does not apply to an action for money lent, as that is not usually the subject of a charge in account—a note being generally taken. Boyer v. Sweet, 3 Scam., 120. Vol. VIII.—24

In New Jersey, the party's books are evidence of work done and articles delivered; as to cash items, it is held that of a single charge they are not evidence, nor of two or three charges standing alone. Carman v. Dunham, 6 Halsted, 189. Yet where there have been miscellaneous dealings between the parties, and there are, among other charges, entries of cash lent, which appear to have been in the course of business, and are according to custom, it is said the practice has been to admit the books in evidence. Craven v. Shaid, 2 Halsted, 345. But the admissibility of the book to prove such items, has been subsequently denied in New Jersey, in Carman v. Dunham, supra, and still later in Inslee v. Prall, 3 Zabriskie, 458, where the book contained charges for cash, interspersed with other charges against other persons, through a course of years. court say: "Goods are generally bought and sold in a store, in a shop-often by clerks, frequently in the presence of a third party; they are mostly taken to a man's family and used there. Services are very generally rendered in public, or there are circumstances which afford some possibility of rebutting fraudulent charges respecting them. But not so with money transactions. They occur at a man's house—on the streets and highways—not in the presence of third parties—perhaps more frequently in private than in public. It can always be safely alleged that they so occurred. You may trace goods to their use, sometimes, but not money, to any certainty. Services generally produce something tangible or visible, with which the service was connected. But no man can prove that at a particular time he did not receive money, unless he can prove an alibi."

In Ohio, if the matters charged are such as generally constitute the subject of a book account—if the book is produced—the performance of the services, if the charge be for work, and the quality, quantity, and delivery of the goods, if the charge be for goods—may be proved by the oath of the party claiming by virtue of the book account. This practice is applicable to charges for goods sold, and

labor and other services performed, contained in the account books of merchants, farmers, mechanics, and professional As to money charges, a distinction is taken. the course of business, small sums are passing between the parties, these may, it is held, be charged on the book, and proved in the same manner as the other items of the account. Yet money lent or paid, especially if in any considerable amount, is ordinarily not the subject of book charge; a note or receipt is usually taken; and therefore, though an individual might be engaged in a business that would justify such charges, yet in ordinary cases they are Crane v. Spear, 8 Hammond, 494. The acinadmissible. tion was on an account, the items amounting to \$900three of the charges, amounting to \$700, were for cash lent. It was proposed to prove them by the party's oath. It was held that it could not have been the intention of the legislature to admit this kind of testimony in such a case. See Smiley v. Dewey, 17 Ohio, 156.

We think the general rule is clearly established by these authorities, that a charge for "money paid," or "money lent," cannot be proved by a party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another.

It may be safely affirmed that the general rule in the business transactions of men is, that the person lending or paying money usually takes a note or receipt. As is said, however, by Hitchcook, J., in *Crane v. Spear*, 8 Ham., 494, an individual might be engaged in a business that would seem to justify such charges—as where one's ordinary business may be said to consist in receiving money on deposit, and paying it out for others. When such fact is shown, the book may be proper evidence of the payment of money. This would not, however, apply to the case of a party engaged in the mere business of keeping a retail store, whose customers purchase goods of him on credit, which are

charged to them in a running account. Loaning, or paying out mouey to his customers, is no part of such a person's business. They would not ordinarily expect to find themselves charged in their accounts with sums of money lent or paid.

The law admits this kind of evidence in any case, only on the ground of "moral necessity." The practice is only justified on the ground, that without such evidence there would, in many cases, be a total failure of proof. At the very best, it is but presumptive evidence, and that, too of the very lowest grade. It should always be received with great caution, and be subjected to the strictest scrutiny. Larue v. Rowland, 7 Barb., 107. The courts and legislatures have jealously limited its operation to that character of dealing to which the law has ascribed, prima facie, a destitution of the ordinary means of proof, viz: the daily sale and barter of merchandise, and other commodities, the performance of services, and letting of articles to hire, and probably the payment from time to time of money placed on depositcircumstances so frequent in succession, and so trivial in their individual amount, that the procurement of formal proofs could not be expected, and would not compensate for the time necessary for the purpose. Brannan v. Force, 12 B. Monroe, 508.

It was not sufficient to constitute the books, in this instance, legitimate evidence of money lent or paid to the plaintiff, that the defendant proved by the witness, Jensen, that the plaintiff was a customer at defendant's "store," and was in the habit of borrowing, from time to time, sums of money from the defendant, which were charged to plaintiff in his account. This might show a course of business between them. But that is not of itself sufficient. The charges, allowed to be proved by the book, are such as persons engaged, as the defendant was, in the business of keeping a retail store, for the sale of merchandise, would, in the ordinary course of business, be expected to make against their customers.

Vie:hs v. Hagge.

The statute has not made any such distinction, as that small sums of money may be proved by the party's books, but that large sums shall not be so proved. The question whether the charges are made in the ordinary course of business, as well as the credibility of the books when produced, is for the jury to determine. They might more readily admit the sufficiency of the book to prove charges of money of a small, than of a large amount. So they might more readily conclude, that the loan or payment of small sums of money by a retail trader to his customers, and charged in their accounts, was more nearly in the ordinary course of business, than the loan or payment of large sums; and if they should judge that small money charges were legitimately made, in the ordinary course of business, we should not be inclined to hold that they might not so determine, and allow them accordingly. See Sloan v. Ault. and Young v. Jones, post.

4. The defendant, in order to prove the account offered by him in set-off, produced in evidence, as before stated, his books of account, on which the several items charged to the plaintiff in the account offered in set-off, appeared charged against him. The plaintiff introduced no independent evidence on his part, to prove any payments made by him to the defendant on said account, but relied in order to establish the same, on the credits given him for such payments upon the account offered in set-off, and the said books of account.

The defendant asked the court to charge the jury, that "if the plaintiff claimed the benefit of the credits given to him by defendant, on his account, on the books of account, and on the accounts set forth in the answer, he thereby made said books and accounts, evidence to go to the jury, and be considered by them, in support of all the items charged against the plaintiff therein, including the cash items, subject to be rebutted as to any of such items, by counter evidence on the part of the plaintiff. And that the plaintiff could not claim the benefit of the items credited to

him on said account, and at the same time exclude from the consideration of the jury, any of the items charged against him in the same account."

The court refused to give the instruction, but directed the jury, that "the plaintiff was entitled to all credits, and all acknowledgments of indebtedness to him, made upon defendant's books, if he chose to avail himself of them. But if, upon examination of the debits and credits, and all the other evidence in the case, the jury believe that the plaintiff delivered property to defendant, and defendant, at the same time, paid over the amount, or a part of it, for which he purchased said property, and the purchase of the property and the payment for it, was one and the same transaction, then the jury may balance the one against the other."

We think there was error in the refusal of the court to give the instruction as requested by the defendant. If the plaintiff had called for the production of the defendant's books of account, and had himself given them in evidence, to prove the credits he was entitled to on the account of the defendant against him, there is no dispute but that he would not be allowed to use the credits entered therein, as evidence in his favor, without at the same time making the debits evidence against him, and in favor of defendant.

But the authorities go farther still; and it is held, that it is no matter by whom the account is given in evidence, or sought to be used. If the party against whom the entries are made, or account rendered, relies upon, or seeks to avail himself of, credits entered in his favor, he will not be allowed to do so without, at the same time, making the whole account evidence against him. The authorities to this point are both numerous and respectable, and so far as we have been able to examine them, are all one way. Morris v. Hurst, 1 Washington, C. C., 433; Bell v. Davidson, 3 Ib., 328; King v. Madox, 7 Harr. & J., 467; Waldron v. Sherburn, 15 Johnson, 409; Turner v. Child, 1 Dev., 133; Waggener v. Gray, 2 Hen. & Mun., 603; Jones v. Jones, 4

Ib., 447; Wakeman v. Marquand, 5 Martin (Louisiana), 2d series, 514.

The question is not, whether the money items charged by defendant to plaintiff, were matters properly chargeable in book account; nor whether the plaintiff, by relying on the credits entered in his favor, made the books evidence to prove what they were not before competent to prove; but it is, whether a party seeking to have the benefit of an admission or declaration of another, must not take the whole admission or declaration together; and whether he will be allowed to select what makes in his favor, and exclude what is against him. 1 Greenl. Ev., sec. 201; Code, sec. 2399.

The credit items of defendant's account against plaintiff, were not to be taken as unqualified and isolated admissions of payment, but as payments made on the account as it stood in his books. The question is not so much whether the books are made competent evidence to prove the money items charged, as whether the whole account is made evidence for defendant, and, with the debits as well as credits, is all to go to the jury.

5. The defendant claimed damages against the plaintiff, by way of set-off, for the wrongful suing out of the writ of attachment. No evidence, it seems, was produced by the plaintiff, on the trial of the issue joined on the averments of the affidavit on which the writ issued, to prove that defendant, at the time of the commencement of the action, had any property not exempt from execution, which he refused to give in payment or security of the plaintiff's claim; nor was there any evidence produced, that the plaintiff had ever demanded such payment or security; nor that defendant had ever refused to give the same.

The defendant asked the court to charge the jury, that the burden of proof was on the plaintiff, under the issue joined, to show such demand and refusal. The court refused so to charge the jury, and instructed them that, "the plaintiff having taken the course prescribed by the law to obtain an attachment, the jury must be satisfied that defendant has es-

tablished the fact that the attachment was wrongfully sued out; that is, that it was sued out unjustly, injuriously, tortiously, and in violation of right, before they can allow the defendant damages for the wrongful suing out of the same."

The defendant had averred that the writ of attachment was wrongfully sued out, because, among other reasons, he (said defendant) had no property, not exempt from execution, which he refused to give in payment or security for any debt justly due from him to the said plaintiff. On issue joined by the plaintiff on this averment, the burden of proof is, without doubt, on the defendant, to show that the writ was so wrongfully sued out; and if he relies upon the fact, to sustain the issue on his part, that no demand was ever made upon him for such payment or security, and that there was, consequently, no refusal, he must prove it.

The true test to determine where is the burden of proof, is to consider which party would be entitled to the verdict, if no evidence were offered on either side; for the burden of proof lies on the party against whom, in such case, the verdict ought to be given. 1 Greel. Ev., sec. 74, note, citing Leet v. Gresham Life Ins. Co., 7 Eng. Law & Eq. Rep., 578.

6. The court directed the jury to find specially on the issue joined, whether or not the writ of attachment was wrongfully sued out; and if they found that it was so wrongfully sued out, to find specially the amount of damages sustained by the defendant in consequence of such wrongful suing out. The jury found for the plaintiff, but returned a special verdict, that the writ of attachment was wrongfully sued out, and assessed defendant's damages therefor at ten dollars. The defendant thereupon moved the court for a judgment on said special verdict, quashing the said writ.— The motion was overruled, and judgment in chief rendered for the plaintiff.

The proceedings relative to the attachment, are independent of the principal suit, and only auxiliary thereto; (Code,

sec. 1847), and it has been held by this court, that no issue can be joined in the principal suit, on the averment of facts contained in the affidavit on which the writ issues. Sackett, Belcher & Co. v. Partridge & Cook, 4 Iowa, 416.

Although the jury found in their special verdict, returned under the direction of the court, that the writ was wrongfully issued, yet such finding by them, was not by virtue of any issue made or joined in the principal suit, but was returned by them as incidental to the issue made in the crossaction by defendant, on the attachment bond, for damages sustained by him from the wrongful suing out of the writ.

The law has provided that the plaintiff, on making oath to certain facts to be stated in his petition, may cause the property of the defendant to be attached. Code, sec. 1846 and 1848. It has made no provision, however, for any issue or proceeding to try the truth of the facts averred in the petition for the writ; nor for the dissolution of the writ, upon its being ascertained that the said averments are not true, and that the writ was wrongfully sued out, even though the same should be made to appear from the verdict of a jury. We do not see that the party injured by such wrongful suing out of such process, has any other remedy for his injury, than by an action on the attachment bond, unless in cases where an action of trespass would lie. For the errors in the instructions above referred to, the judgment will be reversed.

Judgment reversed.

GAMES v. ROBB.

Where in an action of trespass, a county treasurer justified the taking of personal property, for the non-payment of taxes, under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, he need not set out, with a copy of the warrant, the tax list, nor a copy thereof. An averment in his answer, of his readiness to produce the tax list, is all that is required,

Vol. VIII.—25

Where a county treasurer, in justifying in an action of trespass, for the taking of personal property, states in his answer, that he received the tax list for a given year, with the warrant of the county judge attached, in due form, he need not state more to show the authority under which the list was made, and that he was authorized to collect the taxes within the limits of the county, in the manner prescribed by law.

The county judge possesses the power to submit to a vote of the people of the county, the question whether the county will subscribe to the capital stock of a railroad company, whose road is to run through such county, and such a vote is not in derogation of law.

A demurrer admits facts which are well pleaded, but not the law as claimed by the pleader, nor the inference or conclusions drawn by him.

Where taxes are levied under, and by virtue of, a vote of the people authorized by law, a failure on the part of those officers conducting the election, and those whose duty it is, by law, to make the entries, and give the notices, necessary to perfect the vote, will not make the county treasurer liable as a wrong-doer, in the collection of taxes levied under such vote, if authorized by a proper warrant.

Under sections 487, 488 and 492 of the Code, the tax list, with the warrant of the county judge attached, completely protects the county treasurer against the irregular or illegal proceedings of the officers connected with the levy of the tax.

A county treasurer, as to justification in levying upon property for the non-payment of taxes, occupies the same position to all taxes, whether general or special; and his protection is as full and complete in the collection of special, as it is in that of general taxes, in reference to the illegality or irregularity of the assessment.

Where the law authorizes a submission to a vote of the people, as to the levying of a special tax, and there is such a submission in fact, and the result is declared in favor of the proposed tax, the county treasurer is not to be held liable for any failure of the county judge or other officer, to comply with the directory provisions of the law regulating the manner of conducting the election, or their neglect in making the proper entries.

Appeal from the Muscatine District Court.

SATURDAY, APRIL 9.

TRESPASS for taking and carrying away personal property. Defendant is the treasurer of Muscatine county, and justifies the seizure, possession and sale of the property, under a warrant for the collection of certain taxes. The questions made, arise upon demurrers to the answer and

replication. The demurrer to the answer was overruled; that to the replication was sustained. Plaintiffs appeal. The facts are sufficiently stated in the opinion of the court.

D. C. Cloud, for the appellants.

Richman & Brother, for the appellee.

WRIGHT, C. J.—The answer, (or so much as is demurred to), sets up that defendant was at the time of the taking, charged in the petition, treasurer of Muscatine county, and as such officer, was the duly authorized collector of taxes for said county; and that prior thereto, the tax list for the year 1855, was placed in his hands, together with the warrant of the county judge of said county, commanding defendant to collect the taxes mentioned in said list, which said tax list and warrant, he avers he is ready to produce in court. A copy of the warrant he attaches, and asks that it be made a part of his answer. It is further stated, that in said tax list, plaintiff was charged with the sum of (naming the sum), taxes, which, upon request made of him by defendant, he refused to pay; that said taxes became delinquent; that defendant, by virtue of the aforesaid warrant and tax list, proceeded to distrain plaintiff's property for the payment of said tax; that he levied upon the property on the 16th of May, 1856; that he gave notice of the time and place of sale, (a copy of which is attached, dated May 17th, and fixing the sale May 24th, 1856); and sold said property at the time fixed, at public auction, to the highest bidder; and that after deducting said plaintiff's taxes, interest thereon, and the costs of sale, there remained in his hands the sum of, (which is stated), which balance he has offered to pay plaintiff, and which he has refused to receive. So the defendant says that such levy and sale, under the authority stated, is the trespass complained of, and prays judgment.

The demurrer to this answer raises two questions: First, That the tax list, or so much of it as is applicable to the

case, should have been set forth, and made a part of said answer; Second, That it fails to show by what authority the said tax list was made, or the limits within which it was to operate.

Without putting the decision of this part of the case, upon the ground that by replying or pleading over, plaintiff waived his right to insist upon his demurrer, we will, as counsel for appellant have discussed the question at some length, examine the points made. And we are very clear that the demurrer was properly overruled.

It was not necessary to annex a copy of the tax list to When defendant gave a copy of the warrant, attached to the list, as required by the Code, (section 487), and averred his readiness to produce the list itself, he did all that is required of him, in the first instance, by either the letter or spirit of our system of pleading and practice. Section 1750, of the Code, in requiring a copy of the instrument, or account upon which the pleading is founded, to be annexed, has reference to the note—the obligation or written instrument—which is the foundation of the action or defense, rather than a book, like the tax list placed in the hands of the treasurer for the collection of the taxes from year to year. It was intended that this, as well as all the provisions of the Code, should receive a construction consistent with reason, public policy, the nature of the evil existing, and the remedy designed to be applied. It would be clearly unreasonable and absurd, to say that the list itself should be attached, to the detriment and delay of the public business in the collection of the revenues of the county and state. It would be equally absurd to require a copy of the entire list, for this would involve an expenditure—an accumulation of costs, and an encumbering of the record, to an extent required by no rule of pleading, or the rights or interests of parties. It must not be forgotten, either, that such a list is a public record, and to which the plaintiff has full access. He requires no copy to enable him to be fully advised of its features, or its sufficiency as

a warrant, or justification, to the officer acting under it. Not only so, but if the production of such list was deemed material to the just determination of the cause, the district court might, in its discretion, upon proper application, have directed its production for the inspection of the plaintiff. Code, secs. 2423 and 2424. We are unhesitatingly of the opinion, therefore, that the defendant annexed to his pleading, all that was necessary, so far as this objection is concerned.

We are not certain that we correctly apprehend the point made by the second ground of demurrer. As we understand it, it is based upon a misconception of the averments contained in the answer. The law requires the clerk, as soon as practicable after the taxes are levied, to make out a Upon this list, an entry is required to be made, showing what it is, and for what county and year, to which the county judge is required to attach his warrant, under his hand and official seal, in general terms, requiring the treasurer to collect the taxes therein levied, according to This list is required to be delivered to the treasurer, and it is a full and sufficient authority for him to collect all taxes therein contained. Upon receiving this list and warrant, the treasurer is to proceed to collect the taxes levied, and the list and warrant are his authority and justification against any illegality in the proceedings, prior to receiving the list. He is not required to make any demand of the taxes, but all persons subject to taxation, are required to attend at his office and make payment; and if any one shall fail to pay, before the first day of January following the levy, the treasurer is directed to make the same by distress and sale of personal property, "and the tax list alone will be a sufficient authority for such distress. Sections 486-7-8, and 492.

Now, in this case, the answer sets up that defendant is treasurer of Muscatine county, and as such, received the tax list for said county, for the year 1855, to which was at-

tached the warrant of the county judge, under his hand and official seal. When he says that it was the tax list of that county, for that year, he shows by any fair or natural construction, the authority by which it was made prescribes the manner of assessing property—who shall do it—to whom the return shall be made—who shall levy the taxes, and when. With all these things, however, the treasurer has nothing to do, in presenting his authority or justification. He is not required to state what the law is, nor what the law requires, in his pleading. When he states that he received the tax list for the year 1855, with the warrant of the judge attached, in due form, he need not state more, to show the authority under which Taxes have to be levied by the proper the list was made. officer, for the current year, and this not for one year alone, but from year to year; and when the pleader refers to this levy and the list, he refers to those things for which the law provides, and which have a known, definite, and well understood meaning.

As to the limits within which the tax list was to operate, there can reasonably be no room for doubt. The copy of the warrant attached becomes a part of the answer, and is to be regarded as if incorporated into it. From this, in connection with the averments of the answer, we have no difficulty in understanding that the pleader refers to the tax list of Muscatine county, for the year 1855, which was placed in his hands at the proper time, as the officer authorized to collect such list, and that he was to collect the same within the limits of the county, in the manner, and only in the manner, required by law.

We pass to the consideration of the demurrer to the replication.

The replication sets up, that the tax mentioned in the answer, was for railroad purposes, under a particular vote in said county, in the year 1853, to subscribe \$150,000 to the capital stock of the Mississippi and Missouri railroad

company; that if any such proposition was submitted, it was for a purpose not warranted by law; that the county judge had no power to submit the same; that any election held in relation thereto, was illegal and void, "not only because it was for a purpose in derogation of law, but because none of the requirements of law were complied with in said election. The pleader then proceeds to state the respects in which the law was not complied with-as that the judges and clerks were not sworn, as required by law; that they did not make their return to the judges within the time limited; that no notice of the election was given. as by the law required, and that no notice of the adoption of said proposition had been published by the county judge. It is also stated, that said tax is illegal and void, for the reason that there is nothing on the record to show to what purpose the tax to be collected is appropriated.

Two questions are made: First. Had the county judge power to submit such a proposition? Second. If he had, will a failure upon the part of those conducting the election, and those whose duty it is by law, to make the entries and give the notices required, make the defendant liable as a wrong doer?

The first question we understand to be settled, in favor of the power, by the cases of Clapp v. Cedar County, 5 Iowa, 15; Ring v. Johnson Co., 6 Ib., 265, and McMillen v. Boyles, Co. Judge, 6 Ib., 304, and the cases there referred to. It is suggested, however, that the replication alleges that said vote was without authority of law; or if under any law, that such law was unconstitutional and void; that the demurrer admits this, and therefore, should have been overruled. We do not understand that the demurrer admits any such thing. A demurrer admits the facts which are well pleaded, but not the law, as claimed by the pleader; nor the inference or conclusions drawn by him. Chitty's Pleadings, 700.

The second question is settled, as we regard it, against the

appellant, by the case of Hershey v. Fry, 1 Iowa, 593, as well as by the express language of the Code. quoting, we refer to the reasoning adopted, and the principles recognized, in that case, as applicable to the question here made. But it would seem that all doubt was removed, by reference to the authority given to, and the protection thrown around, the treasurer, by virtue of the tax list. have seen that it is declared that the tax list, "shall be a full and sufficient authority to collect all the taxes therein contained "-" that this list and warrant are his authority and justification, against any illegality in the proceedings prior to receiving the list."—and "that the tax list alone, will be a sufficient warrant for such distress." It would seem that language could not be used to more completely protect the treasurer, against the irregular or illegal proceedings of the officers connected with the levy of the tax prior to the receipt of the list, or to more clearly define the power and authority conferred by such list and warrant. 487, 488, and 492.

It is claimed, however, that these provisions have reference to the list made out for the collection of the ordinary state and county revenue, and that no such protection is conferred, when the tax is for a special purpose, raised and levied in a particular manner; and that as to such tax, the treasurer must proceed at his peril, subject to being mulcted in damages for the illegal proceedings of the officers, prior to the delivery of the list to him.

A tax of this character, is levied in pursuance of a vote of the people, upon a proposition submitted to them, which is to contain or specify the rate of tax to be levied for each year. It is styled "an additional tax"—"a special tax"—"a tax in addition to the usual taxes"—and a "distinct fund." When the question is submitted, it is required to be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes. Where the object is that contemplated by the vote had in this instance, the an-

nual rate is to be not less than one mill, nor more than one per cent. on the county valuation, and "becoming delinquent, shall draw the same rate of interest with the ordinary If it is supposed that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year, until the amount is paid. Money so raised, is specially appropriated. and constitutes a distinct fund in the hands of the treasurer. until the obligation assumed is discharged. The recorder of each county is the treasurer thereof, and it is made his duty, as such, to collect the taxes, and receive all money pavable to the county, and disburse the same. He is given authority, as we have before seen, to make the taxes due, by distress and sale of personal property. Code, sections 114-15-16-17-18, 124, 151, 152, 492.

Now, these provisions, as well as those cited in considering the demurrer to the answer, it would seem to us, place the treasurer, as to his justification in levying upon property, in the same position as to all taxes. The county judge should, possibly, be held to a greater degree of strictness as to this additional, or special tax, but the list and warrant are the authority and justification to the treasurer for the collection of this, by the means given him in the law, as much as for the collection of the school, or ordinary taxes of the county. If the tax was levied without authority of the law, or if there was no vote authorizing the subscription, the question presented would be very different. But where the law authorizes such a submission—where there has been such a submission in fact, and the result is declared in favor of the proposed measure or tax, the treasurer is not to be held liable for any failure of the judge, or other officer, to comply with the directory provisions of the Code regulating the conducting of the election, or their neglect in making the proper entries.

It will be observed that this suit is brought to make the treasurer liable, not for any act or omission of his, (so far as Vol. VII.—26

Games v. Robb.

the demurrer reaches), but for the acts or omissions of others. The law has declared explicitly that the tax list and warrant, shall be his authority and justification against any illegality in the proceedings, prior to his receiving the list, and that the tax list alone, will be a sufficient warrant for such distress. This language is general—is not confined to the county or state revenue—to the school, the road, or a special tax, (and all are found in the one list); but the list is his authority to collect the taxes therein contained. The law confers certain powers, and imposes certain duties upon the county judge and other officers, in connection with the levy of such additional, as well as the ordinary taxes. shall exceed their powers, or neglect their duties, they are responsible to the party injured; but it was not intended to make the treasurer—an innocent party—liable for their acts. Hershey \forall . Fry, supra.

It is suggested that the treasurer did not comply with the law, in giving notice of such sale. To this, it is answered, that no such objection is made by the demurrer to the answer, nor is any such allegation contained in the replication. We may say, however, that we see nothing in the record to sustain the position.

The position that defendant might be liable in the action of replevin, though not as a trespasser, is without weight. If, as treasurer, he could collect this tax, by distress and sale, he had a right to take the property levied upon into his possession, and, if rightfully, the replevin would not lie. Code, sections 1994—5; 1 Iowa, 593.

Judgment affirmed.

THE STATE OF IOWA v. McCLINTOCK.

An indictment which distinctly charges an assault and battery only, is good, although it charges the act as being done riotously, and in a violent and tumultuous manner; and such an indictment does not charge an unlawful assembly and riot; nor does it unite two distinct offenses. It is not a valid objection to the admission of a witness in a criminal case,

It is not a valid objection to the admission of a witness in a criminal case, on the part of the state, that his name is not indorsed on the indictment.

Where several persons are jointly indicted for a joint trespass on two other persons, it is error to instruct the jury, that if the defendants struck one of the persons charged to have been assaulted, they are guilty of assault and battery, unless they struck in self-defense.

All who instigate and promote the commission of an unlawful act, are equally guilty with those who commit the act itself; and a person aiding and abetting the commission of an assault and battery, is as guilty as the others, although he did not strike himself.

Where two or more persons are indicted for an assault on two persons, they cannot be convicted of the joint offense, unless the jury find that the assault and battery was committed upon both the persons named in the indictment.

The charge of an assault upon two persons is, in legal contemplation, so far different from a charge of assault upon one of them, that proof of the commission of the act in regard to one, does not sustain the indictment.

Where several persons are charged with a joint assault and battery on two persons, either of the defendants may be convicted for his own separate assault on the persons named in the indictment.

Under an indictment charging several defendants with a joint assault and battery on two different persons, neither of the defendants can be convicted for an individual and separate assault and battery on one of the persons charged in the indictment to have been assaulted.

Appeal from the Henry District Court.

SATURDAY, APRIL 9.

THE defendants were indicted jointly with Alexander McClintock, and Alexander McClintock, junior, for an assault and battery upon Reily Lloyd and Abraham Haynes. The indictment charged that the defendants, at, &c., on, &c., with force and arms, did unlawfully, routously, and in a violent and tumultuous manner, and to the disturbance



of others, in and upon one Reily Lloyd, and one Abraham Haynes, then and there being, make and assault, and them, the said Reily Lloyd and Abraham Haynes, then and there, unlawfully, riotously and routously, and in a violent and tumultuous manner, and to the disturbance of others, did beat, wound, and ill-treat, contrary, &c. the defendants filed a joint plea of "not guilty," together with one of a former conviction. Afterward, they obtained leave to withdraw their "plea of not guilty," and filed a demurrer, which was overruled, upon which they again filed the plea of not guilty, and upon motion, the court severed Alexander McClintock, senior and junior, and granted them a separate trial. After this, the record entitles the case as against Robert and Mitchell McClintock, and H. H. Cohee. There was a trial and verdict, and judgment against the defendants. The other material facts will fully appear from the opinion of the court.

Palmer & McFarland, for the appellants.

S. A. Rice, Att'y General, for the State.

WOODWARD, J.—I. The first and second errors assigned are, that the instructions of the court are inapplicable to the issue generally; and specifically, that while they relate to a trial for assault and battery, the indictment charges an unlawful assembly and riot. In the defendant's demurrer, they had urged that the indictment united two offenses; or, that it was a charge of riot, or for assembling to do an unlawful act, or a lawful act in an unlawful, violent or tumultuous manner, under the Code, (sections 2739, 2740, or 2797); and objected to its sufficiency as a charge for either of those offenses. The same objection is now made in another form.

It is unnecessary to elaborate upon this objection. Although the indictment charges the act as being done riotously, routously, and in a violent and tumultuous manner,

still it distinctly charges an assault and battery only, with force and arms. It is wanting in the terms and descriptions necessary to constitute and distinguish a charge of one of the other offenses above mentioned. The instructions given by the court, relate exclusively to an assault and battery, and are, therefore, applicable, so far as this objection is concerned.

II. The third assignment of error, is to the admission of one Haynes as a witness on the part of the state, his name not being indorsed on the indictment. This case was pending before the Act of 22d of March, 1858, (Acts of 1858, 211), and it has been held by this court, that this is not a valid objection to the admission of a witness. The cases of Ray v. The State, 1 G. Greene, 316, and Harriman v. The State, 2 G. Greene, 272, were decided under different provisions of law in reference to indictments, and are not considered as governing those of the Code. The State v. Abrahams, 6 Iowa, 117.

III. The fifth assignment is to the giving the first, third, and fourth instructions asked by the prosecutor. The first was, that if the defendants, Robert McClintock and Cohee, struck Haynes, they were guilty of assault and battery, unless they struck in self-defense. So far as this carries the idea that a separate assault upon one of the persons, will justify a conviction, it is erroneous. This subject is embraced in a subsequent instruction, and will be referred to again.

The third instruction was, that if the defendants assaulted and struck only one of the persons named, that is Haynes or Lloyd, they are guilty. And the fourth was, that if Cohee was present, "aiding and abetting" the other defendants, who actually did commit the assault upon one of the persons named, he is guilty with the others, although he did not actually strike, himself. It is a familiar rule in regard to trespass, that all who instigate and promote the act, are equally trespassers with those who do it, and are guilty; and, therefore, the fourth instruction is not

subject to objection. The third will be considered together with those made by the defendants.

IV. The fifth error assigned, is upon the refusal to give certain instructions requested by the defendants. The first is to the effect, that they could not be convicted, unless the jury found that the assault and battery was committed upon both Lloyd and Haynes, as charged in the indictment. This was refused; and the converse of the proposition was given, at the request of the prosecutor. In this, we think, the court erred. The instruction should have been given in substance, as asked by the defendants. In a subsequent indictment for an assault and battery upon one of the persons named, the defendants would not be able to give in evidence, under a plea of former conviction or acquittal, the judgment under this indictment.

The defendants further requested the court to instuct the jury: Third. That "under this indictment, neither of the defendants can be convicted for an individual and separate assault and battery upon Lloyd alone, or Haynes alone, at different times." And also, Fifth. "That neither of the defendants can be convicted for an assault and battery under this indictment, if the proof goes no farther than to show a separate assault by Mitchell McClintock upon Haynes, and another upon Lloyd, and a separate assault by Robert McClintock on Haynes." And, Sixth. "That the defendants cannot be convicted under this indictment, for an assault upon Haynes alone, or Lloyd alone."

These instructions were refused by the court. So far as the court held, that either of the defendants might be convicted for his own separate assault on the persons named, they were right; for it is a general rule, that when two are supposed to be jointly guilty of an offense, they may be indicted jointly or severally, and in either case, one may be found guilty. 1 Whart. Cr. Law, 693; Caldwell v. Commonwealth, 7 Dana, 229; Calico v. The State, 4 Pike, 430. But so far as the court held that an assault on one of the persons named, was sufficient to convict; and refused to

instruct that the defendants could not be convicted for a separate assault on one of them, it was erroneous. The charge of an assault upon two is, in legal sense, so far different from a charge of an assault upon one of them, that proof of the commission of the act in regard to one, does not sustain the indictment. It might, at first thought, seem that the same remark would apply to the charge against the defendants as actors in the offense, but a difference exists, based upon reasons which time does not permit us to point out.

It is clearly established, and daily practiced, that one may be convicted, though several are charged. Even when all are convicted, the punishment is several, and this must, from the nature of the case, be so. It is so when the punishment is a fine only. See the cases cited above. On the other hand, if the proof of an assault upon one of the persons named, would justify a verdict of guilty, it would seem to follow that a judgment of conviction or acquittal, under a charge for the one offense, might be pleaded under a charge for the other, because the two offenses would not be distinguishable, evidence of the one being given under a charge of the other.

One or two other points were made, which it will be unnecessary to consider, since, for the foregoing errors, the judgment must be reversed.

NEVAN v. Roup.

A defective notice of the taking of a deposition, is obviated by an appearance and cross-examination of the witness.

Where it appears from a deposition, that the witness is a non-resident of the state, it shows a sufficient reason for taking the same; and it will not be suppressed, although the witness may answer that he intends to be personally present at the term of court at which the cause is to be tried, unless it be shown that the witness is present in court.

Where on the taking of a deposition before the clerk of the district court of Iowa county, on the 15th of May, 1858, the witness stated that he resided in St. Louis, Missouri, and that he intended to be present in attendance at the next term of the said Iowa county district court, if alive and well; and where the next term of said court would be held on the first Monday of November next ensuing; Held, That the deposition showed a sufficient reason for taking the same.

Delivery and possession is essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing.

Where goods are in possession of a bailee for hire, to which, by his labor or skill, he has imparted additional value, he has a lien for his charges thereon, where there is no special contract, inconsistent with such lien; but he has no right to retain them for the payment of "other debts" due him by the bailor, without a special agreement to that effect.

It is essential to the bailee's right to a lien upon the goods, until his charges for his labor or skill are paid, that the goods should have been delivered into his possession, for the purpose of such labor and skill.

If the bailee parts with his possession, before he is paid his charges, the lien is lost, and will not be reinstated by his again coming into possession of the goods, without the consent or agreement of the bailor.

Where in an action of replevin, to recover the possession of a certain quantity of oats, it appeared that the oats had been grown by S. and his brother, on land rented of defendant; that during the last week in December, 1857, the oats were threshed, and left in rail pens on the land of defendant, where they were grown; that on the first day of January, 1858, S., after setting apart to defendant his portion of the oats, for the rent of the land, which were placed in a separate pen, sold the remainder of the oats to the plaintiff, received payment, and delivered them to him as they were in the said rail pens; and that the land on which the pen with the oats stood, was still in possession of S. at the time of delivery to the plaintiff; and where the defendant claimed to hold the oats under a lien for threshing the same, and as a pledge for the payment of board of the said S. and his brother; and where the court, at the request of the plaintiff, charged the jury as follows: "That to constitute a pledge for debt, there must be an actual delivery of the property into the possession of the creditor; and if the oats were purchased by the plaintiff, for a valuable consideration, without notice of defendant's claim, and defendant did not have actual possession from S., the jury must find for plaintiff;" and where the defendant asked the court to instruct the jury as follows: "That if the oats were threshed by the defendant for S., and left in his possession on the land on which he levied, and if S. owed the defendant for threshing the same, and other debts, that defendant had a lien upon the oats until he was paid; and no sale to plaintiff, without actual delivery and taking out of possess-

ion of defendant, could divest him of his right to possession," which instruction was refused; *Held*, 1. That a constructive possession was sufficient to constitute a pledge; 2. That the first instruction was erroneous; 3. That the instruction asked by defendant was properly refused.

Appeal from the Iowa District Court.

SATURDAY, APRIL 9.

This was an action of replevin, commenced before a justice of the peace, for two hundred and fifty bushels of oats. The defendant answered, denying the unlawful detention complained of, and averring that the oats were the property of J. W. & H. Stratton; and said Strattons being indebted to the defendant in the sum of \$12,25 for the threshing of the oats, he claims a lien upon the oats for that amount; and being further indebted to defendant in the sum of \$46,00 for board, they delivered the same to defendant, to secure the payment of said last mentioned sum, and that defendant is entitled to retain possession of the same, until said several sums are paid.

There was a judgment for the defendant by the justice of the peace, and an appeal to the district court. In the district court, exception was taken to the overruling of the motion of defendant, to exclude the deposition of John W. Stratton, and to the refusal of the court to give certain instructions asked by defendant, and to the giving of those asked by the plaintiff. There was a verdict and judgment for plaintiff. The defendant appeals. The other material facts are stated in the opinion of the court.

Templin & Fairall, for the appellant.

Clark & Brother, for the appellee.

STOCKTON, J.—The objections made to the sufficiency of the notice to take the deposition of Stratton, are obviated Vol. VIII.—27

by the fact that defendant appeared and cross-examined the witness.

The defendant further objected to the deposition, that no reason was shown why the same was taken. ness, in reply to the first interrogatory, stated that he resides in St. Louis, Missouri; and that he intended to be present in attendance at the next term of the court, if alive The deposition was taken before the clerk of the district court of Iowa county, on the 13th of May, 1858. The next term of the district court for said county, was held on the first Monday of November, 1858; and it is claimed by defendant, that as it is shown by answer of the witness, that he intended to be present at that term, no reason was shown for taking the deposition. think it is sufficient, if the deposition shows that the witness is a non-resident. If this fact is shown, or such other fact as renders the taking of the deposition legal, it will not be excluded, because the witness answers that he intends to be personally present at the next term of the court; nor unless it is shown that the witness is present in Code, section 2463. court.

The evidence in the cause shows, that the oats in controversy had been grown by one J. W. Stratton and his brother, on land rented of defendant; that during the last week in December, 1857, the oats were threshed, and left in rail pens, on the land of defendant, where they were grown. On the first day of January, 1858, the Strattons, after setting apart to defendant his portion of the oats, for rent of the land, which were placed in a separate pen, sold the remainder of the oats to the plaintiff, and received payment for them, and delivered them to him as they were in the rail pen on the ground from which they were grown. The land on which the pen with the oats stood, was still in possession of the Strattons, at the time of the delivery, and they had not, at the time, given up possession of the same to defendant, of whom it had been rented. This is all the testimony shown by the record.

At the request of the plaintiff, the court charged the jury, "that to constitute a pledge for debt, there must be an actual delivery of the property into the possession of the creditor; and if the oats were purchased by the plaintiff, for a valuable consideration, without notice of defendant's claim, and defendant did not have actual possession from Strattons, the jury must find for plaintiff. And that the possession of defendant was wrongful, and he had no right to take such possession, unless the Strattons had delivered the oats to him.

Delivery is, no doubt, essential to a pledge. Possession of the pledge must be delivered to the pledgee. But this possession may be according to the nature of the thing pledged. The delivery may be symbolical, or of a part for the whole. The delivery of a key, where the goods are locked up, is so far a delivery of the goods that it will support an action of trespass against a subsequent purchaser, who gets possession of them. It was not necessary, in this case, that there should have been an actual delivery of the oats into the possession of defendant, by the Strattons. A constructive possession was, in all respects, allowable. 1 Pars. on Cont., 443, 595; Brownell v. Hawkins, 4 Barb., 491.

The defendant asked the court to instruct the jury, "that if the oats were threshed by the defendant for the Strattons, and left in his possession, on the land on which he lived; and if Strattons owed Roup for threshing the same, and other debts, that Roup had a lien upon the oats until he was paid; and no sale to Nevan, without actual delivery and taking out of possession of Roup, could divest him of his right to possession." This instruction the court refused to give.

For goods in his possession, to which by his labor or skill he has imparted additional value, a bailee for hire, has a lien for his charges thereon, where there is no special contract inconsistent with such lien. *Morgan* v. *Congdon*, 4 Comstock, 551; Story on Bailments, sec. 440.

Cameron, Adm'x. v. Armstrong.

Conceding that defendant was entitled to retain possession of the oats, until his charges for threshing the same were paid, he had no right to retain them for the payment of "other debts," due him by the Strattons, without a special agreement to that effect. As the instruction asked, assumes that he had the same right to retain the oats until these "other debts" were paid, as he had to retain them until the charges for threshing were paid, we think there was no error in the refusal of the court to give it. Jarvis v. Rogers, 15 Mass., 389. We may add, that it was essential to the defendant's right to a lien upon the oats, until the charge for threshing was paid, that the oats should have been delivered into his possession, for the purpose of thresh-If he parted with his possession before he was paid the lien was lost, and was not reinstated by his again coming into possession of the oats, without the consent or agreement of the Strattons. Bailey v. Quint, 22 Ver., 464.

Other questions are made by the appellant, upon the instructions given and refused by the court, but as the foregoing views may be sufficient for the final disposition of the cause in the district court, they need not now be considered. For the error in the charge before indicated, the judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

CAMERON, ADM'X. v. ARMSTRONG.

A demurrer to the petition is waived by an answer; and the defendant, after answering, cannot assign for error in the appellate court, the judgment of the court overruling the demurrer.

Where a defendant, after his demurrer to the petition is overruled, files an answer, with pleas of tender and set-off, and subsequently withdraws

Cameron, Adm'x. v. Armstrong.

his plea of set-off, leaving his answer and plea of tender on file, he is not in a position to assign error on the overruling of the demurrer.

Where the action is brought upon a mere money demand, and the amount for which judgment should be rendered, a mere matter of computation, the damages may be properly assessed by the clerk.

Where a petition claims a sum certain from the defendant, with interest, it is not error to render judgment for a greater amount than the sum claimed.

Appeal from the Des Moines District Court.

SATURDAY, APRIL 9.

The plaintiff claims of the defendant the sum of seven hundred and seven dollars and fifty cents, which she alleges to be due to her, and states her cause of action as follows: "that defendant leased of plaintiff the 'National Hotel' building in Burlington; and that the above sum, with interest thereon, is due and owing petitioner, as a balance due on the several leases executed by petitioner in favor of defendant for the said building, a particular account of which sums and interest is attached to petition. She, therefore, asks judgment for that amount, with interest and costs."

A demurrer to the petition was overruled at the October term, 1857. Defendant then filed his answer, denying the allegations of the petition, together with his plea of tender and set-off. Issue being joined, the defendant moved the court for a continuance of the cause until the next term. The motion being overruled, and the cause coming on for trial, the record entry states: "Whereupon defendant withdraws his set-off, heretofore filed in this case, and stands upon his demurrer, heretofore overruled; and thereupon the same being submitted to the court, and the court being fully advised in the premises, finds for the plaintiff," and the damages being assessed by the clerk at the sum of \$723,84, judgment for that amount was rendered in favor of plaintiff.

Atkins v. M'Cready et al.

C. Ben Darwin, for the appellant.

No appearance for the appellee.

STOCKTON, J.—This cause has been presented to us in the argument by counsel for the appellant, as though he had elected to stand upon his demurrer to the petition, and had suffered judgment to go against him as for want of an answer. This is not our understanding of the record. The defendant filed an answer, together with pleas of tender and set-off. Issue being joined thereon, and the defendant's motion for a continuance overruled, he withdrew his set-off. The answer was not withdrawn, nor the plea of tender. We think the demurrer was waived by the answer; and the defendant cannot now assign, for error, the judgment of the court overruling the same.

As the action was for a money demand, and the amount for which judgment should be rendered, a mere matter of computation, the damages were properly assessed by the clerk. The objection that the damages allowed are for a greater amount than prayed for in the petition is not tenable. The petitioner asks judgment for the amount of her claim, with interest.

Judgment affirmed.

ATKINS v. M'CREADY et al.

Where in a suit commenced before a justice of the peace, a judgment is rendered against the defendant, in default of appearance, and he appeals to the district court, it is not irregular for the district court to affirm the judgment of the justice, on the motion of the plaintiff, where the appellant does not appear.

Where an appellant from the judgment of a justice of the peace, appears in the district court, he must demand a trial upon the merits, before he can object in the appellate court, that the motion of the plaintiff to affirm the judgment of the justice was improperly sustained.

Atkins v. M'Cready et al.

Where an action was commenced before a justice of the peace, against the makers of a joint promissory note, one of whom was served with notice, and against whom judgment was rendered, for want of an appearance; and where a bond for an appeal was filed, signed by the makers of the note, and another party, and recited that W., (against whom the judgment was rendered), had appealed from a judgment, &c., in an action wherein A. is plaintiff, and M. are defendants; and where the justice certified that "defendant filed their appeal bond, with J. M. as surety, which was approved by me, and appeal allowed;" and where it was objected that it was error to render judgment against M., for the reason that he was not served with notice, and there was no judgment against him before the justice, and that no sufficient appeal bond was ever filed; Held, 1. That as M. was one of the sureties upon the appeal bond, the plaintiff was entitled to judgment against him; 2. That while the bond did not refer to the proceedings with critical accuracy, yet that there was no irregularity that could prejudice the appellants.

Appeal from the Polk District Court.

SATURDAY, APRIL 9.

PLAINTIFF declared before a justice of the peace, upon two notes made by Martin P. M'Cready and Jackson Wilson. M'Cready was not served. Wilson was served, and failing to appear, judgment was entered against him by default. The justice certifies that "defendant filed their appeal bond, with John M'Cready as security, which was approved by me, and appeal allowed." This bond is signed by the makers of the notes, and John M'Cready, and recites that Wilson has appealed from a judgment, &c., in an action wherein Nathaniel Atkins is plaintiff, "and Martin P. M'Cready are defendants." In the district court, upon plaintiff's motion, the judgment of the justice was affirmed, and it was ordered that plaintiff recover from said defendants and their security, John M'Cready, the sum, &c. From this judgment, the M'Creadys appeal.

Williamson & Nourse, for the appellants.

Bates & Phillips, for the appellees.

Atkins v. M'Cready et al.

WRIGHT, C. J.—Wilson has not appealed, and we therefore pass, without comment, so much of the argument and assignment of errors as relate to him. We direct attention alone to so much of the case as concerns the parties appealing.

The appellants object that the court erred in not trying the cause upon its merits, and in affirming the judgment upon plaintiff's motion, without any cause being assigned They did not appear before the district court, nor was any defense interposed to plaintiff's demand, at any stage of the proceedings. Being in default, there was, in fact, nothing to try; and there was no irregularity in affirming the judgment of the justice, upon the motion of plaintiff. If they had made an appearance, however, they should have demanded a trial upon the merits before they could object in this court, that this motion of plaintiff was improperly It is next objected, that there was error in rendering judgment against Martin P. M'Cready, for the reason that he was not served, and there was no judgment against him before the justice. It is true that he was not served, and that the justice had no jurisdiction over his person. He was one of the sureties upon the appeal bond of Wilson, however, and it was the plaintiff's right to demand judgment against him as well as Wilson. Code, section 2347. In this view of his liability, his position, as one of the makers of the note, becomes quite unimportant. ther is it material to inquire whether he was, or was not, served with notice of the action before the justice.

It is claimed, however, that there was no sufficient bond; that the one in the record describes another and different case; and that there was error, therefore, in rendering judgment against the sureties. If we look alone to the language of the bond, this is true. We have seen, however, that the justice certifies that an appeal was taken in the case wherein Atkins was plaintiff, and Wilson and Martin P. M'Cready were defendants, but in which M'Cready was not served; and that John M'Cready was the surety upon the appeal

Savery v. Savery.

bond. Such a bond was filed by the justice with the other papers in the district court, and appears to have been filed and approved by him as an appeal bond in the cause. This bond recites the name of the plaintiff—refers to the judgment rendered by the justice—that Wilson appeals therefrom; but further recites that "Martin P. M'Cready are defendants." This reference to the defendants, is the only thing that gives any ground for the position that the bond was taken in another case. Everything else shows, beyond any fair doubt, that it belongs to, and was taken in this action. And this reference to the defendants by no means shows that it describes another suit. The notice was issued as well against M'Cready as Wilson, and the justice might. in the bond, refer to one or both as defendants, without departing entirely from the case upon his docket. Not only so, but the language used will fairly justify the conclusion that Wilson's name was omitted by mistake, for the plural term (defendants), is employed, evidently showing that M'Cready was not the only defendant.

While, therefore, it may be admitted that the bond does not refer to the proceedings with critical accuracy, and while the record leaves it doubtful whether Martin P. was one of the principals, or a surety in the appeal bond, we cannot see that there is any such irregularity as could possibly prejudice either of the appellants. And, under such circumstances, it is our duty to affirm.

Judgment affirmed.

SAVERY V. SAVERY.

Where in an action on a promissory note, the defendant obtained a rule on the attorney of the plaintiff, to show the authority under which he appeared to prosecute the action, which rule was based upon an affidavit, alleging that the plaintiff, (the indorsee), and the payee of the note, resided at Rome, in the state of New York; that the plaintiff, some time Vol. VIII.—28

Savery v. Savery.

in the year 1855, told the affiant, that the payee of the note had simply transferred to him the note sued on, as collateral security for the payment of a claim held by him against the said payee; that he had received the same upon the express understanding and condition between them, that he should not bring suit on the same against the defendant; and that he should not bring any action against him; and where the attorney answered the rule under oath, stating that in July, 1855, he received a letter from D. & L., of Rome, N. Y., whom he believed to be attorneys at law, of that place, enclosing the note sued on, stating that the note was the property of the plaintiff, and instructing him to secure it, or put it at once in process of collection, which showing, the court held sufficient; Held, 1. That the affidavit filed on the part of defendant did not make out a prima facis case, and the court might well have refused the rule in the first instance; 2. That the showing made by the attorney was sufficient.

Appeal from the Polk District Court.

SATURDAY, APRIL 9.

Suit on a promissory note for the sum of one hundred and fifty-nine dollars, payable to G. W. Savery, or bearer, three months after date, and dated May 28, 1851. fendant obtained a rule against the plaintiff's attorney, to show the authority under which he appeared to prosecute the action. This rule was granted, upon the affidavit of Sarah Savery, that the plaintiff and the payee of the note, reside at Rome, in the state of New York; that the plaintiff, sometime in the year of 1855, told the affiant, that G. W. Savery, the payee of the note, had simply transferred to him the note sued on, as collateral security for the payment of a claim held by him against said G. W. Savery; that he had received the same, upon the express understanding and condition between them, that he should not bring suit on the same against defendant; and that he should not bring any action thereon against him.

The plaintiff's attorney answered on oath to the rule, that in July, 1855, he received a letter from Dennison & Lynch, of Rome, N. Y., whom he believed to be attorneys at law of that place, enclosing the note sued on—stating that the note

was the property of Richard G. Savery, of Rome, and instructing him to secure it, or put it at once in process of collection.

The court decided that the attorney had shown sufficient authority, and allowed him to appear and prosecute the action. To this ruling of the court, there was an exception, and the defendant appeals.

T. E. Brown, for the appellants.

Williamson & Nourse, for the appellee.

Stockton, J.—We think there was no error in this decision of the court. The authority shown by the attorney, in the absence of anything to throw a suspicion on its good faith, was sufficient to justify the court in permitting the attorney to prosecute the suit. It will be observed, that there was no motion to dismiss the suit, for want of sufficient authority shown by the attorney to commence, or prosecute the same; and there was no affidavit of defendant, to the effect that he believed that the attorney was prosecuting the suit without authority. The affidavit filed does not make out even a prima facie case against him; and the court might well have refused the rule, in the first instance, unless the defendant had shown some better reason for granting the same.

Judgment affirmed.

Young v. Jones.

Where a party seeks to recover for work and labor performed under a special contract, which he sets out in his petition, the defendant may show that the work was performed under a special contract differing from that declared upon by the plaintiff.

Where a plaintiff claimed of the defendant \$164 50, and averred that at the special instance and request of defendant, he worked for him nine8 219 90 580 8 219



ty-four days, and defendant promised to pay him therefor, \$1.75 per day—all of which was denied by the answer; and where, on the trial, the defendant offered to prove that the work done by plaintiff was done under a special contract, by which he was to pay the plaintiff \$75.00—which testimony was rejected by the court; *Held*, That the evidence was admissible.

The loan or payment of money is not ordinarily the subject of charge n book accounts; and such a charge not being such as is made in the ordinary course of business, cannot be proved by the account book.

To render books of account competent to prove the payment of money, the party offering must show that he is engaged in a business to justify such charges, as that of the business of banking; or of receiving money on deposit, and paying it out for others.

If allowed at all, the privilege must be strictly guarded, and only allowed where the jury may be of opinion that the party is without any other proof, and that there has been such a course of continuous dealing between the parties, as that small sums passing between them in the ordinary course of business, became the legitimate subject of charge in book account.

The statute of Iowa, providing for the admission of books of account in evidence, has made no such distinction, as that small sums of money, may be proved by a party's books of account, but that large sums shall not be so proved.

Appeal from the Des Moines District Court.

SATURDAY, APRIL 9.

The plaintiff sued the defendant, claiming the sum of \$164 50, and averring that at the special instance and request of defendant, he worked for him ninety-four days, and defendant promised to pay him therefor \$1 75 per day, which he now refuses, &c. The defendant answered, denying that plaintiff worked ninety-four days, as alleged; denying that he owed the plaintiff \$164 50, as alleged, or any part thereof; and denying that he undertook and promised to pay plaintiff \$1 75 per day for his work. There was also a plea of payment and of set-off.

On the trial, the defendant offered to prove that the work by plaintiff was done under a special contract, for which defendant was to pay the plaintiff \$75 00. The testimony was objected to by the plaintiff; the objection was sustain-

ed by the court, and the evidence excluded. The defendant proposed to prove his set-off by his books of account, and in the language of the bill of exceptions, "in the regular manner, as provided by law, qualified the same, and that each and all the items in defendant's set-off, were charged in defendant's book of accounts." Thereupon the book was permitted to go to the jury as evidence. The set-off contained items of money paid to plaintiff, amounting to thirty-five dollars—one item of twenty dollars, and three each of five dollars. The court charged the jury, that "the items of the set-off for money paid, could not be proved by the book of accounts; and that the book was not, of itself, evidence of the fact of money paid to plaintiff, as charged therein, and contained in defendant's set-off. To this ruling of the court, the defendant excepted.

Browning & Tracy, for the appellant.

C. Ben Darwin for the appellee.

STOCKTON, J.—We think the evidence first offered by the defendant, should have been received. The plaintiff does not sue to recover, as upon a quantum valebat, or quantum meruit, for as much as his work was worth, or as much as he therefor reasonably deserved to have; but he sues as upon a special contract, by which he avers, the defendant promised to pay him one dollar and seventy-five cents per day, for ninety-four days' work. Without considering, at present, whether the plaintiff was bound to prove the contract as laid, and whether a misstatement of the quality or nature of the defendant's promise, and his consequent liability theron, would be a fatal error, subjecting the plaintiff to a non-suit, it is evident that the defendant may be allowed to show, in any manner, that the contract laid in the petition was not the agreement of the parties; and what mode so effectual for this purpose, as to prove an entirely different contract and promise of defendant? If

the defendant could have proved that the agreement of the parties was, that for the work done by the plaintiff, he was to be paid seventy-five dollars only, the evidence would at least have gone to defeat his claim pro tanto; and it might become a question whether he could recover at all in this action, without amending his petition.

Books of account are competent evidence, when the charges they contain are made in the ordinary course of This fact is to be determined by the jury, from the charges themselves, and from the rules of law applicable to the business transactions of men. One of these rules is, that the loan, or payment of money, is not ordinarily the subject of a charge in book account; and that the charge not being such as is made in the ordinary course of business, by one party against another, cannot be proved by the account book. To render the book competent to prove the payment of money, the party offering it must show that he is engaged in a business to justify such charges; as, to illustrate, in the business of banking, or of receiving money on deposit, and paying it out for others. If the payment or loan of money constituted, in any just sense, the ordinary business of defendant, and these charges of money paid, were made in the ordinary course of business, he may justly claim the right to prove them by his books, but not otherwise.

The rule that the books are inadmissible to prove the loan or payment of money, has been so far departed from in some of the New England states, as to allow the proof, by the book of original entries, of the payment of money not exceeding forty shillings, or six dollars and sixty-six cents, (\$6,66). Bassett v. Spofford, 11 N. H., 169; Burns v. Fay, 14 Pick., 12; Union Bank v. Knapp, 3 Ib., 109; Prince v. Smith, 4 Mass., 455; Wetherell v. Swan, 32 Me., 247: Richardson v. Emery, 3 Foster, 220.

The exception may have some show of necessity, if not of principle, to support it. Our statute, however, has made no such distinction, as that small sums of money may

be proved by a party's books of account, but that large sums shall not be so proved. If allowed at all, the privilege must be strictly guarded, and only admitted in cases where the jury may be of opinion, that the party is without any other proof; and that there has been such a course of continuous dealing between the parties, as that small sums of money passed between them in the ordinary course of business, and became the legitimate subject of a charge in book account, by one against the other. If they should so judge, we think they should be at liberty to allow the same. See Veiths v. Hagge, 163.

Judgment reversed.

ZUGG v. TURNER.

Where a lease of a building provided, that if the lessee would put up a summer kitchen, adjoining the rooms leased, on the south, the lessor would pay him the cost of it, at cash rates, at the expiration of the lease; and where the lessee built the kitchen, and on the day it was completed, assigned the demand for the payment of it, on the lease, as follows: "For value received, I hereby assign to F. Z., all my rights and benefits of the last clause of the within lease, and empower him to collect the cost of the said kitchen, and apply the same for his own benefit;" Held, 1. that the fact that the agreement to pay for the kitchen was in writing, did not constitute it such an agreement as is intended by section 949 of the Code; 2. That the claim assigned was only an open account, coming under section 951, which permitted the assignee to bring suit on the claim, in his own name, and gave the debtor the right to avail himself of any defense or set-off, legal or equitable, against the assignee which he had against the assignor, before the commencement of the suit. T. made to F. a written lease for five months, of part of a building in Keokuk, at \$10 00 per month, payable at the end of each month. lease was about to expire, it was extended by a new lease in writing, for one year, the rent payable as before, the last clause of which lease provided, that if F. would put up a summer kitchen adjoining the rooms leased, on the south, T. would pay him the cost of it at cash rates, at the expiration of the lease, which lease expired on the 26th of April, 1858. F. built the kitchen, which was finished on the 16th of October, 1857, and on the same day assigned the demand for payment to Z., by writing

8 222 j144 62

on the lease as follows: "For value received, I hereby assign to F. Z., all my rights and benefits of the last clause of the within lease, and empower him to collect the cost of said kitchen, and apply the same for his benefit." Z. then sued T. for \$60 00, the cost and value of the said work, and the defendant claimed a set-off of \$50 00, as due him from F., for the last five months' rent of the premises, and \$10 00 for the use of another lot; Held, That the defendant was entitled to set off-the rent against the cost of the kitchen.

Appeal from the Lee District Court.

SATURDAY, APRIL 9.

TURNER made to Chas. Folger a written lease, for five months, of part of a building in Keokuk, at ten dollars per month, payable at the end of each month. As this lease was about to expire, it was extended by a new lease in writing, for one year, the rent payable as before. clause of the instrument was a contract to the effect, that if Folger would put up a summer kitchen, adjoining the rooms leased, on the south, Turner would pay him the cost of it, at cash rates, at the expiration of the lease which was on 26th of April, 1858. Folger built the kitchen, which was finished on the 16th October, 1857, and on the same day assigned the demand for the payment to Zugg, by writing on the lease, in these terms: "For value received, I hereby assign to Frederick Zugg all my rights and benefits of the last clause of the within lease, and empower him to collect the cost of the said kitchen, and apply the same for his own benefit."

Zugg now sues Turner for sixty dollars, as the cost and value of the said work. The defendant claimed a set-off of fifty dollars, as due him from Folger for the last five month's rent of the premises, and ten dollars for the use of another lot.

The action was commenced before a justice of the peace, who found for the plaintiff, and the defendant appealed. Upon the appeal, the cause was tried by the court, who found the lease, the extension, and the assignment as is

above stated, and the contract relating to the building; that Folger did the work, and that the value of it was \$47,10; that at the time of the assignment from Folger to Zugg, Folger was not indebted to Turner; that Turner had notice of the assignment before Folger became indebted to him, but that at the time Folger quit the premises, and previous to the commencement of this suit, he was indebted to Turner in the sum of \$50 for the rent; and that Zugg was indebted to him \$10, for the rent of another lot as a lumber-yard. On these facts, the court rendered judgment in favor of the plaintiff for \$37,10, and ordered that he pay the costs of ("this court,") the district court. To this, the defendant excepted, and he appeals.

Turner & Craig, for the appellant.

Chas. W. Lowrie, for the appellee.

WOODWARD, J.—The question in the case is, whether the defendant was entitled to his set-off of fifty dollars.

It would seem that Folger had paid the rent up to the 26th of October, 1857, and that Turner permitted that of the remaining five months to stand unpaid, as if, with it, to pay the cost of the new building. At the time of the assignment from Folger to Zugg, Folger was owing Turner nothing, and Turner had notice of the assignment, but yet seeks to set-off against Zugg the rent which accrued after the assignment, all of which fell due before the bringing of the action.

The defendant places his claim to a set-off upon section 952 of the Code; and to avoid this, the plaintiff's argument is of the following tenor, and is so ingeniously put that it should not be passed in silence. He says: "Now, what is an 'open account.' In 2 Story's Equity, it is said, that by mutual credit we are to understand a knowledge, on both sides, of an existing debt due to one party, founded on and trusting such debt, as a means of discharging it. The mere existence of distinct debts, without mutual credit,

Vol. VIII.—29

will not give a right of set-off in equity." Did Turner, he asks, depend upon Folger's building the kitchen as a consideration and security for the payment of the rent? And he argues that the credits were not given in dependency upon each other; and urges that as Folger was not indebted at the time of the assignment, and as there was no open account between Folger and Turner, therefore the set-off should not be allowed. He cites, further, Davis v. Milbourn, 3 Iowa, 163.

The party here seeks to place this upon the ground of equitable set-off. But the principles upon which these are based, and the rules by which they are governed, are entirely different from those which govern in law. In this, a mutual dependency—a mutual credit, in the equity sense, is not required. It is sufficient that there be a debt on each side, as is seen often in the fact of setting off a debt purchased from a third party, as a note, bill, &c. Our statute speaks of an open account. This party asks, what is an "open account," and proceeds to answer the question by showing what are mutual credits in the equity sense. His error lies in confounding the legal notion of a set-off with the equitable notion of mutual credits.

The case of *Mead v. Gillett*, cited from 19 Wend., 397, proceeds upon the common law rule, which was the law here before our present statute, but which is not now applicable. And perhaps the same remark is true of *Watt v. The Mayor*, &c., 1 Sandf., 23, or at least that case goes upon a rule pertinent to liquidated demands only; and to render it available, the party singularly attempts to make it appear that this account for erecting the kitchen, is a liquidated demand, upon the ground that that is certain which can be made certain; and this, he says, is effected by the proof and judgment.

Enough has been said to show the argument upon which the plaintiff stands. But the case falls plainly under section 952 of the Code, as affected by section 951, and the provision is thus: "An open account of sums of money due on Pierce v. School District No. Four, of Liberty Township, Marshall County.

contract, may be assigned, and the assignee will have the right of action in his own name, but the maker (debtor), may avail himself of any defense or set-off, legal or equitable, against the assignee, which he may have against any assignor thereof before suit is commenced." The fact that the agreement to pay for the building is in writing, does not constitute it such an "instrument" as is intended in sections 949 to 952, but the claim is nevertheless only an open account. The whole contract was not assigned. Zugg was not to do the work, but Folger did it, and then assigned, so that the only thing which was assigned was the claim for the money—the "open account."

The set-off should have been allowed; wherefore the judgment is reversed, and the cause remanded for a new trial.

Reversed.

PIERCE v. School District No. Four, of Liberty Township, Marshall County.

Where in an action to recover a balance due on a contract for building a school house, a copy of which contract was attached to the petition, and was signed by the secretary of the district, the averments of which petition was denied by the answer, the plaintiff first offered in evidence the instrument of writing attached to the petition, which was objected to, and excluded by the court; and where the plaintiff then called witnesses, and proposed to prove that he had called upon the directors of the school district for the contract, or a copy thereof, to work by in building the school-house, and that the directors delivered to him the instrument, and told him to work by the same, in building the house; and where the plaintiff proposed to offer the said instrument in evidence, as the contract between the parties, all of which evidence was excluded by the court; Held, That the court erred in excluding the evidence.

Appeal from the Marshall District Court.

SATURDAY, APRIL 9.

Surr commenced before a justice of the peace, to recover a balance alleged to be due on a contract for building a school house. Upon appeal to the district court, certain evidence offered by the plaintiff, being objected to by the

Pierce v. School District No. Four, of Liberty Township, Marshall County.

the defendant, was excluded by the court; upon this ruling of the court, and upon the ordering a non-suit, the errors are assigned.

- E. W. Eastman, for the appellant.
- T. Brown and H. C. Henderson, for the appellees.

STOCKTON, J.—The plaintiff attaches to his petition, and makes part of the same, an instrument of writing in the form of a contract between the parties, stating the size of the house to be built, and the price agreed to be paid therefor, signed by the secretary of the school district. This instrument, the plaintiff alleges, was the basis of the contract between the parties, and the evidence of the terms of the same; and alleging that the house has been completed as required by the terms of the contract, and accepted by the defendant, he claims the sum of one hundred dollars, as due him from defendant on the contract. The defendant answers, and denies that any such contract was made; denies that a school-house has been built by plaintiff, under the same, or accepted by defendant; and denies any indebtedness to the plaintiff on account of the same.

On the trial, the plaintiff offered in evidence, the instrument of writing, attached to and made part of his petition; the defendant objected, and the court refused to receive the evidence. The plaintiff then called witnesses, and proposed to prove, that he had called upon the directors of the school district for the agreement, or a copy of the same, to work by in building the school-house, and that the directors delivered to him the said instrument, and told him to work by the same in building the house, which he did; and then proposed to offer the said instrument in evidence, as the contract between the parties. To this the defendant objected, and the court sustained the objection, and refused to permit the said evidence to go to the jury.

Sloan v. Ault.

In this, we think, the district court erred. Issue had been joined between the parties, as to whether the instrument of writing set forth the agreement between the parties, and as to whether the house had been built according to the terms of the same. The evidence offered by the plaintiff, and rejected by the court, tended to prove both these facts, and should, consequently, have been received. If the fact was, that the parties had made another and different agreement, it was competent for them, at any time, to alter the same; and the evidence offered was altogether pertinent to show, that whatever might have been the contract as to the erection of the house, when the plaintiff called upon the defendant for a copy of the same, by which to erect the building, it was then agreed between them that it should be built according to the instrument attached to the plaintiff's petition, and which he proposed to give in evidence.

Judgment reversed.

SLOAN v. AULT.

In an action to recover for goods, wares, and merchandise, sold and delivered, the plaintiff offered in evidence his books of account, which contained a charge against the defendant as follows: "To cash, as per receipt, \$50 00." The defendant objected to the competency of the book to prove the charge for money, which objection was sustained by the court; Held, 1. That the receipt was the best evidence of the payment of the money; and that until it was produced, or its absence accounted for, no lesser grade of evidence could be received; 2. That the books were not competent evidence to prove the payment of the money.

Appeal from the Jasper District Court.

SATURDAY, APRIL 9.

An action on an account for goods, wares, and merchandise sold and delivered. The defendant denied the indebt-

Sloan v. Ault.

edness. To prove the truth of the account sued on, the plaintiff gave in evidence his book of original entries, and after reading to the jury certain of the items therein charged to the defendant, he came to the charge: "To cash, as per receipt, \$50 00." The defendant objected to the competency of the book to prove the charge for money; the court sustained the objection, and plaintiff excepted.

Samuel A. Rice, for the appellant.

Miller & Winslow and W. H. Seevers, for the appellee.

STOCKTON, J.—We think there was no error in this ruling of the court. The charge in the book referred to a receipt, which appears to have been taken at the time of the transaction. This receipt was not produced, nor was there any attempt to account for its absence. Until produced, or its absence accounted for, no lesser grade of evidence could be received to show the payment of money to the defendant.

Books of account are receivable in evidence to prove the truth of charges by one party against the other, made in the ordinary course of business. Code, section 2406. Money lent or paid, especially if in any considerable amount, is not ordinarily the subject of a book charge. The authorities to this effect are uniform, and have been fully considered by us in the case of Veiths v. Hagge, ante, 163; Young v. Jones, ante, 219.

The general rule of law, as applicable to the business transactions of men, is, that a person lending or paying money, usually takes a note or receipt; that such a transaction is not usually the subject of a charge in book account; and the charge, not being such as is made in the ordinary course of business by one party against another, cannot be proved by the books of account. If the party is engaged in a business to justify such charges, as in the business of banking, or of receiving money on deposit, and paying it out for others, the book may be competent evidence to prove them. This does not, however, apply to the case of a party en-

gaged in keeping a shop for the sale of goods, wares, &c., which are charged to his customers in open or running account. He cannot be permitted to offer his books in evidence, as sufficient, of themselves, to prove the loan or payment of money to his customers.

Judgment affirmed.

THE STATE OF IOWA v. PIERCE.

Section six of chapter 133 of the Laws of 1858, entitled "An act to amend chapter 96 of the Code," was intended to meet the case where all the persons summoned as grand or petit jurors, fail to attend, or where it is determined by the court, that, for any cause, they were illegally elected and drawn.

The act entitled "An act to amend chapter 96 of the Code," approved March 22, 1858, (Acts of 1858, 257), does not repeal section 1647 of the Code, by express words, nor is there any conflict between the two. The latter governs where a sufficient number of jurors fail to attend, and the former, where all fail, or where the selection and drawing were illegal.

Where to an indictment for forgery, the defendant pleaded that all of the grand jurors summoned by the sheriff, under the precept issued to him, did not attend at the time appointed, and thereupon the court directed the sheriff to complete the panel, by selecting talesman, and prayed that the indictment be set aside, to which plea, a demurrer was sustained; Held, That the demurrer was properly sustained.

Where a party is charged with forging an indorsement on the back of an order or draft purporting to have been drawn by one bank upon another, proof of the existence of the bank is not required; nor is it necessary to aver the genuineness or validity of the instrument forged.

The language, spirit, scope and tenor of section 2643 of the Code, shows that it extends to cases for falsely making and uttering indorsements on any note, bill, order or instrument, as well as to falsely making and uttering the body of the instrument itself.

The essence of the crime of forgery, consists in doing the act, with the intention to defraud.

Where a writing is invalid on its face, it cannot be the subject of forgery, for the reason that it has no legal tendency to effect a fraud; but where the invalidity is to be made out by proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same, may be punished.

- In order to constitute the crime of forgery, it is not necessary that any person should have been defrauded in fact. The attempt to defraud, and the intention to do so, is sufficient.
- In the absence of any statutory rule, the order of proceedings in challenging petit jurors, may be properly left to the discretion of the judge trying the cause; and such discretion will not be interfered with, unless it is clearly made to appear that it has been abused.
- Where on the trial of an indictment, the district attorney challenged a juror peremptorily, and then the defendant one; and where, the panel of jurors being filled, the defendant insisted that the state should exercise a second peremptory challenge, if any more were to be made, which the court refused, and required the defendant to challenge the second time, before the state exercised the right, holding that upon his failure to do so, the defendant would waive the privilege as to one juror; Held, That the rule adopted by the court was fair and equitable.
- Where the name of L. H. Mason was indorsed on the indictment, as a witness on the part of the state, and on the trial, the state called Levi H. Mason, to whom the defendant objected, for the reason that his name was not upon the indictment, and no notice had been given, as required by the act entitled "An act amending section 2918 of the Code," &c., approved March 22, 1858, which objection was overruled, and the witness permitted to testify; Held, That the objection was properly overruled.

Appeal from the Linn District Court.

MONDAY, APRIL 11.

The defendant was indicted for forgery, in writing the name of one Fay across the back of a certain order, drawn by a bank in Rhode Island on a bank in New York, with intent to defraud, &c. Objections were made to the manner of impanneling the grand and petit jury, as also to the indictment, all of which were overruled. Exceptions were taken to the admission of certain testimony, and to the giving and refusing of certain instructions. Defendant was found guilty, and sentenced to the penitentiary for three years. The other material facts are stated in the opinion of the court

- I. M. Preston, for the appellant.
- S. A. Rice, (Attorney General), for the State.

Wright, C. J.—It seems that all of the grand jurors, summoned by the sheriff under the precept issued to him, in due form, did not attend at the time appointed, and therenpon the court directed the sheriff to complete the panel by selecting talesmen. The prisoner, by plea, set up these facts, and asked, that by reason of the same, the indictment should be set aside. A demurrer to the plea was sustained, and we think correctly.

The objection was, as we understand it, that a precept should have been issued to the sheriff, and that, without such precept, he could not regularly fill the panel. record and plea, however, both recite that the court directed the sheriff to summon, forthwith, the number necessary to make up the deficiency, which he accordingly did. the court acted in strict accordance with the Code, which provides (section 1647), "that if the requisite number of iurors does not appear by the time appointed, the court may, at any time thereafter, direct the sheriff to summon, forthwith, the number necessary to make up the deficiency." It is not suggested in the plea even, that a precept did not issue. and we need not, therefore, determine, whether the sheriff could not properly complete the list without such written process. It is insisted, however, that a precept is required to be issued by section 6, chapter 133, Laws of 1858, That section was intended to meet the case 257. where all the persons summoned fail to attend, or where it. is determined by the court that, for any cause, they were illegally elected and drawn. Under such circumstances. the sheriff is, in obedience to a precept, to summon a new list from the body of the county. The section of the Code is not repealed by any express words, nor is there any conflict between it and the law of 1858. The one governs where a sufficient number fails to attend; the other, where all fail, or where the selection and drawing were illegal. The case of Dutell v. The State, 4 G. Greene, 125, if good law, is very far from being analagous to the one before us.

The indictment charges that the defendant, having in his Vol. VIII.—30

possession a certain order, "whose tenor follows, that is to say—" (setting it out in words)—on the back of which was an indorsement, "whose tenor follows," (setting it out), did falsely make, forge, and counterfeit, on the back of said order, an indorsement as follows," (setting it out), with intent to defraud, &c. The offense charged is not the forging of an indorsement upon an order drawn, in fact, by the one bank upon another, but one that purported to be so drawn. It is not alleged, in words, that this was the purport of the instrument, but by setting it out, it is shown that it purports to be so drawn.

If the charge had been for forging an indorsement upon an order drawn by a company duly incorporated, then proof of the existence of the incorporation would have been necessary. State v. Newland, 7 Iowa, 242. Where the charge is that the instrument purported to be so drawn, proof of the existence of the bank is not required. Where such proof is necessary, it need not be by producing the charter or act of incorporation, but by proving what the general reputation is as to the existence of the bank. Code, section 2643. the language of this section—its spirit, scope, and purpose includes the proof to be made, where the charge is for falsely indorsing, as well as where it is for falsely making the note, bill, order, or instrument itself. The object was to obviate a very great and acknowledged inconvenience, in the trial of causes for forgery and counterfeiting, growing out of the difficulty in proving the actual existence or incorporation of a chartered company. To confine the statute to causes where the forgery is of the body of a note, bill, or other evidence of debt, and hold that it does not extend to cases of falsely making and uttering indorsements thereon, would leave the remedy in view, and the change of the common law rule, contemplated and intended, but half accomplished. reason and spirit of the law, if not its very letter, covers both cases.

Nor is it necessary, in such cases, to aver the genuineness or validity of the instrument forged. The essence of the

crime consists in doing the act with the intention to defraud, &c. It is defined to be the false making, or materially altering, with intent to defraud, of any writing, which, if genuine, might be apparently of legal efficacy, or the foundation of a legal liability. And it may be equally forgery, though the person purporting to be the maker or obligor, or otherwise chargeable in the writing, is a mere petitioner's name, because there may be equally an attempt to defraud. 1 Bishop's Cr. Law, section 423, and notes. If the writing is invalid on its face, it cannot be the subject of forgery, for the obvious reason that it has no legal tendency to effect a fraud. Where, however, the invalidity is to be made out by the proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished. 2 Bishop, Secs. 442, 444, and note; 3 Arch. Pl. & Pr., note 1, 547, and especially on 754-11, 12, 13, 14. And the case cited by counsel, (People v. Shall, 9 Cow., 778), teaches no contrary doctrine. Says COWEN, J: "It is scarcely necessary to observe that the instrument set out in the indictment, is not a promissory note within the statute of Anne; and it is agreed that the writing does not come within any of the statutes of forgery, it being payable neither in money, nor goods, nor labor. The indictment is, therefore, based upon the common law." again: "The question presented is, whether the fraudulent making of a writing, void in itself, and so appearing in the indictment, be the subject of a prosecution for forgery." He then proceeds to show that the writing forged, if genuine, would have been a mere nullity for any purpose, and that this invalidity was patent upon the face of the instrument. Thus construing the instrument, there was, of course, no difficulty, under the cases quoted and commented upon by the learned judge, in holding that legal forgery could not be predicated of it. In this case, however, the instrument is, on its face, of at least apparent legal effect. It appears to be an order or draft drawn by one bank upon another, in the ordinary course of business, for a definite sum of money,

payable on demand, or at sight. To treat it as invalid, we must assume the non-existence of both institutions, a presumption no more allowable in cases of this character, than if the instrument had been drawn by one individual upon another.

The suggestion, that as the order had already been assigned by the genuine indorsement of the payee, to "Fay or bearer," the writing of the name of Fay was not necessary to the transfer of the instrument, and that therefore no fraud could possibly have been perpetrated, is without force. out force, because it is not necessary, in order to constitute the crime, that any person should have been defrauded in The attempt to defraud, and the intention to do so, is If, however, the act is not of a nature which could, under any circumstances, and however far carried, do execution, it cannot be said to amount to such an intent to defraud as to constitute forgery. 1 Bishop, section 423, ch. 25 and note. In this case, it is manifest that this last rule has no place, from the fact that, while the writing of the name of the indorsee, Fay, was not necessary to negotiate or transfer the instrument, it purported to, and was intended, to increase the liability of the person whose name was thus The subsequent holder of the instrument, treating the indorsement as genuine, had, as a consequence of it, the responsibility of Fay, as well as the prior indorsers.

We have thus, without referring to the causes of demurrer in detail, stated what we understand to be the law governing the questions presented. And as some of the same questions are made in the objections taken to the instructions, what has been said sufficiently disposes of that part of the case. We may add, however, that while the first instruction, if taken abstractly, without reference to the others, or the case actually upon trial, might be erroneous; yet, when viewed in connection with the matter before the court and jury, as every instruction should be, it is not objectionable. Its meaning is, not that the mere signing of the name

of another, without more, would constitute forgery, but that forgery might be committed by signing such a name, as an indorsement, upon the back of an instrument like that introduced in evidence. When thus considered, it would be correct.

In making up the trial jury, the district attorney challenged a juror peremptorily, and then the defendant one. The panel being again full, the defendant's counsel insisted that the state should exercise a second peremptory challenge, if any more was to be made; but the court refused this, and required the defendant to challenge the second time, before the state again exercised the right, and ruled that upon the failure to do so, the defendant would waive the privilege as to one juror. This is now assigned for error.

A defendant, when on his trial for a felony, where the punishment is less than imprisonment in the penitentiary for life, may challenge peremptorily six jurors, and the state three. Code, sec. 2981. In what order this right is to be exercised, is not provided for expressly by our law. The rule in civil cases is, that the parties challenge alternately, commencing with the plaintiff. In the absence of any statutory rule, we think that the order of proceeding may be properly left to the discretion of the judge trying the cause, and we would not interfere with its exercise, unless in a case clearly showing that it had been abused.

The rule adopted in the present case, seems to us fair and equitable, and is in strict analogy to that prescribed in the trial of civil causes. In civil cases, the parties have a right to each challenge five jurors; whereas, in criminal cases, the state can challenge but half as many as the defendant. A rule which would permit the defendant to reserve all his challenges, until the state had exhausted all those allowed to it, finds no warrant certainly either in the letter or spirit of our law, and has neither necessity nor fairness to recommend it.

The State of Iowa v. Pierce.

The name of L. H. Mason was indorsed on the back of the indictment. Upon the trial, the state called Levi H. Mason, and the defendant objected that the witness could not testify, for the reason that his name was not upon the indictment, and no notice had been given, as required by chapter 109 of Laws of 1858. This objection was overruled, and we think very properly. The point of objection is, that though the name of L. H. Mason was indorsed on the indictment, this could not authorize the introduction of a witness named Levi H. Mason. The court could well conclude, however, that the witness was the same in both cases. It is not a case even where the initials used would be likely to point to some other person as the witness, and thus mislead the prisoner. It nowhere appears that the witness sworn, was any other than the one examined before the grand jury, and whose name was indorsed on the indict-On the contrary, it is reasonably certain that they were the same.

It has been determined that under the Code, the state was not confined, on the trial of a cause, to the witnesses examined before the grand jury. State v. Abrahams, 5 Iowa, 117. What change, if any, the law of 1858, chapter 109, has made, we need not determine, as, for the reasons before stated, we think the witness was properly permitted to testify.

The judgment of the court below must be affirmed. Before dismissing the case, however, we remark that we do not understand the case of *Smith* v. *The State*, 4 G. Greene, 189, to necessarily decide anything different from what is held above on the subject of peremptorily challenging jurors. In that case, the district court held that the defendant could not be permitted to challenge even two jurors, until the state had challenged one; and, consequently, that if the state failed to exercise the right, the defendant would thereby be deprived of the right to challenge. Such a rule was held to be erroneous, and more than this, it was not necessary to decide. The two cases are, as we think, very different.

Judgment affirmed.

SAVERY v. SPAULDING.

Where in an action of trespass, brought by an assignee under an assignment for the benefit of creditors, in which the question was, whether the assignment was fraudulent and void, a witness for the defense, answered, that he thought he could "guess very nearly the amount of goods the assignors had in their store, at the time of the assignment," and the court decided, that if the witness knew the amount, he might state it, but that he could not give an opinion upon the subject; Held, That even if the ruling of the court was erroneous, the testimony was in no sense so important or material, that its rejection could have prejudiced the rights of the defendant, or should call for a reversal of the judgment.

In an action of trespass, where the material question is, whether an assignment was made with the intent to hinder and delay creditors of the assignor, and is, therefore, void, a question to a witness, whether a cellar was a proper place to store goods? is immaterial and irrelevant.

The declarations of an assignor for the benefit of creditors, as to the amount of goods on hands, made after the execution of the assignment, are not admissible in evidence against the assignee.

A breach of trust, or violation of duty, by an assignee, does not affect the question of the validity of an assignment, for the benefit of creditors; and evidence of such breach of trust, or violation of duty, is not admissible to show that the assignment is fraudulent and void.

Where in an action of trespass, in which the plaintiff claimed the property under an assignment for the benefit of creditors, and the question was, whether the assignment was fraudulent and void, the defendant called the clerk of the court, and asked him a question as follows: "State whether the plaintiff, as assignee of C. & B., has reported to the district court of P. county, the situation and amount of the estate of the said C. & B., either in writing or otherwise, and whether any such written statement was on file in his office?" which question being objected to, was excluded by the court; Held, That the question was properly excluded.

Where a party, under the belief that he is insolvent, though he may not be so in fact, makes an assignment, in good faith, for the benefit of all of his creditors, the assignment is not void, for the reason that he was not insolvent.

Where a party at the time of making an assignment for the benefit of creditors, is unable to pay his debts according to the usage of trade, or unable to proceed in his business, without some general arrangement with his creditors, or some indulgence by way of the extension of the time of payment, he is insolvent in the contemplation of law, and may make a valid assignment.

The fact that some of the agents and servants of the assignee, af

8 286 98 396

assignment, sold some of the property assigned on credit, will not vitiate an assignment.

The fact that the grantor in an assignment for the benefit of creditors, was engaged in the store in the capacity of clerk only, after the execution of the assignment, is not, of itself, evidence of fraud in making the assignment.

Appeal from the Polk District Court.

Monday, April 11.

This is an action of trespass, for taking and carrying away certain goods, wares and merchandize, which the plaintiff claimed as assignee of Chandler & Bell, under an assignment for the benefit of their creditors. Spaulding justified the taking of the goods, as sheriff of Polk county, under and by virtue of an attachment against Chandler & Bell, and averred that the said assignment was made with the intent to hinder and delay the creditors of the said Chandler & Bell, and that the same was fraudulent, upon which issue was joined.

During the progress of the trial, the defendants intro. duced as a witness, one Harry Stephenson, who testified that he "thought he could guess the amount of goods Chandler & Bell had in their store at the time of the assignment." The defendants then asked the witness to state the amount of the goods, which question was objected to by the plaintiff, and the objection sustained, the court holding, that if the witness knew the amount, he might state it, but that he could not give an opinion upon that subject. witness further testified, that certain goods sold by him for the plaintiff, as assignee for Chandler & Bell, had been stored by the plaintiff in a cellar, and thus damaged. The defendants then asked the witness-"whether a cellar is a proper place to store goods, such as he had been testifying about? which question was objected to, and the objection sustained.

The defendants also called Wm. T. Smith as a witness,

and asked him the following question: Whether at, or immediately before, or after the assignment of Chandler & Bell, he had any conversation with either Chandler or Bell, in regard to the amount of goods by them assigned to Savery; and if so, to state that conversation? This question being objected to, the objection was sustained, the court holding that the declarations of Chandler & Bell, made immediately preceding the assignment, were competent to prove the amount of goods on hand; but that their declarations upon that subject immediately after the assignment, should be excluded.

The defendants then called the clerk of the court, and asked him to state to the jury, whether the plaintiff, as assignee of Chandler & Bell, had reported to the district court of Polk county, the situation and amount of the said estate of Chandler & Bell, either in writing or otherwise; and whether any such written statement was on file in his office? This question was also objected to, and the objection sustained. To A. Newton, a witness, the defendants put this question: what was the credit of Chandler & Bell in New York, at or near the assignment, which being objected to by the plaintiff, was held to be improper by the court.

Among other instructions, the court gave the following to the jury:

- 1. That if Chandler & Bell, when they made the assignment, thought they were insolvent, although, in fact, they were not, the assignment, if made in good faith, was sufficient.
- 2. That if Chandler & Bell were unable, at the time of the assignment, to pay their debts according to the usage of trade, or were unable to proceed in their business, without some general arrangement with their creditors, or some indulgence in point of time, by way of extension, then they were insolvent; and under our law, could make a valid assignment.

3. That the fact that some of the agents and servants of Vol. VIII.—31

the plaintiff, after the assignment, sold some of the goods assigned on credit, does not vitiate the assignment.

4. That the fact that Chandler, one of the grantors in the assignment, was engaged in the store-house, in the capacity of clerk, after the assignment, is not, of itself, evidence of fraud in making the assignment.

The jury returned a verdict for the plaintiff, on which judgment was rendered, and the defendant appeals.

Finch & Crocker, for the appellant.

- The court erred in excluding the testimony of Harry He shows himself to have been possessed of Stephenson. a sufficient knowledge, to warrant the reception of his opinion as to the amount, (value) of the goods on hand in the store of Chandler & Bell, at the time of their assignment. No rule of law requires that the witness should speak with such expressions of certainty, as to exclude all doubt in his 1 Greenf. on Ev., 593, and "though the opinion of witnesses are in general not evidence, yet on certain subjects, some classes of witnesses may deliver their opinion, and on certain other subjects, any competent witness may express his opinion or belief." 1 Greenf., 594. It was important in determining the question of fraud, to ascertain the value of the goods on hand, when the assignment was made, and the exclusion of Stephenson's and the like testimony, and requiring that the witness should speak from actual knowledge, would, as a general thing, render it impossible for defendant to prove the amount or value of the property in the store at the time of the assignment.
- 2. The court erred in excluding the testimony of Stephenson, as to the manner in which the assignee kept the goods after the assignment; also, the court erred in excluding the testimony of Hoxie, clerk of the district court. Their testimony was admissible as tending to show the fidelity with which the assignee discharged the trust. It was the duty of the assignee to convert the goods into cash, with-

out delay, and the manner in which he discharged the trust, should be considered by the jury in determining the question of fraud. Wilson et al. v. Ferguson & Lamont, 10 Howard's Practice Reports, 178; Hart et al. v. Cram et al., 7 Paige, 37.

- 3. The court erred in excluding the testimony of Smith, as to declarations of Chandler & Bell, at the time of, and after the assignment. In all cases, the declaration of a person under whom a party derives title, made before, or at the time of the sale, are admissible to show fraud in the sale; and in cases of assignment, the declarations of the assignor, made after the assignment, are admissible to prove fraud. Lathenvhite v. Hicks, Busbee Law, (N. C.), 105; 10 How., 178; Caldwell v. Williams, 1 Ind., 405.
- 4. The testimony of Newton should have been admitted, to show that the credit of Chandler & Bell, in New York, was such, that they could have proceeded in business without making an assignment.
- 5. The court erred in giving the jury the instructions asked by the plaintiff, marked 1 and 4, for if the assignor has ample property to pay his debts, then it is a fraud upon his creditors to assign his property for that purpose. The creditors are entitled to payments in cash, when their debts become due, and if the assignors had ample means to pay their debts in cash, as they became due, there was no reason for making a general assignment; and an assignment under such circumstances, is a fraud. Willard's Eq., 248.
- 6. That the continuance of the possession of the assignor, and various acts of ownership by him, subsequently asserted, afford evidence to a jury from which fraud may be inferred. See Willard's Eq., 468; Gardner v. Adams, 12 Wend., 297; Jackson v. Zimmerman, 12 Ib., 299; Bissell v. Hopkins, 3 Cow., 166; 10 How. Prac. Reports, 178; Caldwell v. Williams et al., 1 Ind., 405.
- 7. That the assignee is bound to sell the property, either at public or private sale, without delay, and pay over the proceeds to the creditors; and that he cannot delay the

creditors until the property can be sold at the highest retail prices. See 10 How. Prac. Rep., 178; Hart et al. v. Cram et al., 7 Paige, 37.

J. M. Ellwood, for the appellee.

- In certain cases, as of experts, and in cases where a witness is supposed to have some superior knowledge, a witness is permitted to give his opinion. But it is well settled, that in such cases the witness must first show himself qualified to speak on the subject, and he must show that he has such knowledge as will enable him to speak with some degree of accuracy. The opinion must be called for in respect to some matter of skill or science. Lawrence v. Caryl, 4 Denio, 370; Norman v. Wells, 17 Wend., 136; Paige v. Hazard & Kelley, 5 Hill, 603; Morehouse v. Matthews, 2 Comstock, 514; Merritt v. Seamore, 2 Selden, 168; Gibson v. Williams, 4 Wend., 320; Jeff. Ins. Co. v. Cotheal, 7 Wend., 72. Now, it seems to me clear, that the amount of goods in the store, at the time of the assignment, was a question of fact, susceptible of positive and exact proof, and in respect to which, the opinion of the witness was not allowable; and, it will be observed, that the ruling of the court expressly permitted the witness to state the amount of the goods, if he knew it, but that he could not give his opinion.
- 2. The defendants allege error upon the refusal of the court to allow them to put another question to the witness, Stephenson. It was the duty of the court to exclude all evidence which was not pertinent or relevant to the issues in the case. The question to which this evidence was directed, was to the validity of the assignment. The answer alleged that the assignment was fraudulent. This was denied by the replication. This presented to the jury the direct issue, whether or not the assignment was fraudulent. And the conduct, or misconduct of the assignee, after the assignment, in relation to the mode and manner of taking care of the goods, was not competent evidence to invalidate

or vitiate the assignment, on the ground of fraud. No subsequent illegal acts or intentions, can invalidate an assignment valid in its inception. *Browning* v. *Hart*, 6 Barb., 91.

3. The second error assigned is, "that the court erred in excluding the testimony of H. M. Hoxie, clerk of the district court of Polk county." The court properly sustained the objection to this question. The evidence offered or called for by the question, was not relevant or pertinent to the issue made by the pleadings. It was offered to show that the assignee, since the assignment, had failed, and neglected to comply with the requirements of the act of the legislature, passed January 29, 1857. Session Laws of 1857, chap. 254, 430. This assignment was executed and delivered before that act took effect. The thirteenth section of that act relates to assignments made prior to its becoming a law. This section makes it the duty of assignees who had already accepted their trusts, "to report to the district court of the county where such assignee resides, the situation and amount of such trust estates, &c." The act further provides that in case of the failure of the assignee to file, or make such a report, any person interested, may obtain a citation to issue to such assignee, requiring him to show cause why such report should not be filed, and on such hearing, the court may order the report to be filed, and "may make all such orders in the matter as may be proper and necessary to insure a faithful performance of the trusts, and a speedy close of the same."

The failure of the referee to make such a report under this act, could not vitiate an assignment valid in its inception. This view is sustained by the act itself. The fact that the assignee had omitted to make the report, could in no way effect the validity of the assignment. Proof of the fact that he had not, would have in no way tended to establish fraud in the assignment, and was, therefore, properly excluded.

4. The third error assigned is, that the court erred in excluding the testimony of W. T. Smith. We submit, that in this ruling, there was no error against the defendants. The question called for the declarations of Chandler & Bell, who were not parties to the suit; and while we believe that the ruling of the court was incorrect which permitted the declarations of Chandler & Bell, made before the assignment, to be given, we most strenuously insist that there was no error in excluding their declarations, in regard to the amount of property assigned to the plaintiff, made after the assignment.

Chandler & Bell sustained to Savery the relation of They were, in law, venvendors of personal property. dors, and Savery a vendee. The fact that Savery was only the assignee, and received the property in trust for creditors, did not change the relation of vendor and vendee between them. This question, then, called for the declarations of the vendors, to impeach the title of the vendee. Such declarations were incompetent evidence. Martin, 8 Greenleaf, 77; Parker v. Grout, 11 Mass, 157; Jones v. Hunter, 13 Mass., 304; Dunn v. Snell, 15 Mass. 481: Frear v. Evertson, 20 Johns., 142; Hurd v. West, 7 Cow., 752; Sprague v. Kneeland, 12 Wend., 161; Bristol v. Dann, 12 Wend., 142; Kent v. Frank. Bank, 7 Wend., 256. And the same rule extends to assignments in trust for cred-House v. Coryton, 4 Taunt., 560; Robson v. Kemp. 4 Esp., 234; Taylor v. Kinlock, 1 Stark., 175; 2 Stark., 549; Phenix v. Dey et al., 5 Johns., 411; Hanna v. Curties, 1 Barb. Chan., 263.

Chandler & Bell were competent witnesses, and should have been called. The declarations of competent witnesses, or of persons who may be called as such, cannot be given in evidence. See cases above cited; and, also, in point, Ogden v. Peters et al., 15 Barb., 560.

There is a class of cases, holding that where a combinanation of several persons, for an illegal object, is clearly established, then the declarations of all the parties are ad-

missible. But the combination for the purpose of fraud or other illegal objects, must first be established by other evidence. Waterbury v. Sturtevant, 18 Wend., 353. In this case, they sought to establish the fraud by the declarations of parties who were competent witnesses, and before any fraud had been shown. Their declarations certainly were not competent to establish the fraud.

The appellant, to sustain this error, cites the case of Wilson v. Lamont, 10 Howard's Practice Reports. This case was decided by a single judge at chambers, and if in conflict with the repeated decisions of the supreme court and court of appeals of that state, is entitled to but little consideration. A close examination of this case, will show that it furnishes no authority to sustain the positions of appel-The case does not decide that the declarations of the assignor are competent to invalidate the assigment; but that facts arising subsequent and prior to the assignment, may be evidence of fraud. The question as to whether the declarations were competent or not, does not appear to have been raised or decided in that case. Indeed, the declarations of the assignor seem to have been given in evidence, on the trial, without objection, and having been received by the parties as part of the evidence, the judge, in this case, only decided upon their effects.

The appellant also cites the case of Williams v. Caldwell, 1 Indiana, to the same point. This case decides only the point decided by 18 Wend., 353, above cited—that after the fraud had been established by other evidence, to the satisfaction of the court, then the declarations of the assignor were competent to be given in evidence. They are not competent until that fact has been established. Error must appear affirmatively, and this court will not presume, in order to render this evidence competent, that the illegal combination had been established when this evidence was offered.

Again. Suppose this assignment was fraudulent on the part of Chandler & Bell, in point of fact, yet it could not

be avoided by creditors, unless the grantee (Savery), participated in the fraud, and was a party to it. Harrison v. Phillips Academy, 12 Mass., 456; Budge v. Eggleston, 14 Mass., 245, 250; Foster v. Hall, 12 Pick., 89. And, it seems clear, that the declarations of Chandler & Bell, after the assignment, were in no respect competent evidence, to show fraud on the part of Savery. Their declarations were not facts; and there was no offer to connect these declarations with Savery, so as to show any fraud on his part. Had they been parties, their declarations would have been evidence to show fraud as against them, but their declarations should not have been received to establish fraud against the assignee.

The fourth error assigned is, "that the court erred in excluding the testimony of A. Newton."

This evidence had no relevancy to the issue between the parties. It tended to prove no fact, asserted by the one party and denied by the other. It neither directly or indirectly sustained any allegation contained in the pleadings. If it was irrelevant, it was properly excluded.

The next assignment of error is, that the court erred in giving to the jury four instructions asked by the plaintiff. The first instruction is, "that if Chandler & Bell, when they made the assignment, thought they were insolvent, although in fact they were not, the assignment, if made in goood faith, is sufficient." To show that this instruction was correct, we cite the following authority: Willard's Eq. Jur., 247; Ogden v. Peters et al, 15 Barb., 560; Rokenburgh v. Hubbell, 5 Law Reporter (N. S.), 95.

The second instruction complained of under the assignment of error is, "that the fact that some of the agents and servants of the plaintiff, after the assignment, sold some of the goods on credit, does not vitiate the assignment." In the giving of this instruction there was no error. It is true, there is a class of cases which hold, and doubtless correctly, that where the assignment, on its face, provides for a sale on credit, the assignment is void. Nicholson v. Lea-

vitt, 2 Seld., 510. And the decision rests on the ground that the instrument, on its face, shows that it is fraudulent, being, in its terms, designed to hinder and defraud creditors; and that the assignment itself, on its face, furnishes evidence of this intent to defraud.

The third instruction complained of under the fifth assignment is, "That if the jury find that Chandler was in the store, only in the capacity of a clerk, receiving pay for his services, after the assignment, that it, of itself, is no evidence of fraud." This instruction was correct. After the assignment, one of the assignors was employed by the assignee, as clerk, for a few days; and we submit, that if the jury found that he was acting merely as a clerk of the assignee, under pay as such, that fact was not, and could not, in any way, be evidence of fraud. The assignee was authorized to employ him as clerk, if in his judgment, the interests of the creditors would be thereby promoted. there been a question as to whether he was there as clerk, or as assignor in possession, and had the court instructed that his being in possession would be no evidence of fraud, this might have been error. But this instruction contemplates him in the store merely as clerk.

The fourth instruction complained of under the assignment of errors is, "that if Chandler & Bell were unable, at the time of the assignment, to pay their debts according to the usage of trade, or were unable to proceed in their business, without some general arrangement with their creditors, or some indulgence in point of time by way of extension, then they were insolvent, and under our law could make a valid assignment. This instruction was correct. To support it, we only cite the following authorities: Herrick v. Borst & Warnick, 4 Hill, 650; Ogden v. Peters et al., 15 Barb., 560. These cases are directly in point, and settle the point, that there was no error in the instruction.

STOCKTON, J.-1. The witness, Stephenson, answered, that he could "gness very nearly the amount of goods Chand-Vol. VII.—32

ler & Bell had in their store room, at the time of the assignment," and the district court decided, that if the witness knew the amount, he might state it; but that he could not give any opinion upon the subject. Even if the ruling of the district court was erroneous, which we do not decide, the testimony was in no sense so important or material, that its rejection could have prejudiced the rights of the defendant, or should now call for a reversal of the judgment.

- 2. So, we think, the question asked the same witness, "whether a cellar was a proper place to store goods," was properly ruled out, as immaterial and irrelevant to the issue.
- 3. The district court, we think, properly ruled that the declarations of Chandler & Bell as to the amount of goods on hand, made after the execution of the assignment, could not be received in evidence.
- 4. It was immaterial and irrelevant to the issue, whether the plaintiff, as assignee of Chandler & Bell, had or had not reported to the district court, the amount and condition of the assets in his hands; and the testimony of Hoxie on that subject, was properly excluded. A breach of trust, or violation of duty by the assignee, does not affect the question of the validity of the assignment.
- 5. The question as to the credit of Chandler & Bell in New York, at the time the assignment was made, was irrelevant to the issue, and the question asked the witness, Newton, on that subject, was properly ruled out.
- 6. The instructions of the court to the jury, were to the effect that if Chandler & Bell, at the time of the assignment, thought they were insolvent, although in fact they may not have been so, the assignment, if it was made in good faith, is sufficient; and if at the time they were unable to pay their debts according to the usage of trade, or were unable to proceed in their business, without some general arrangement with their creditors, or some indulgence, by way of extension of time of payment, then they were insolvent, and could rightfully make an assignment for the

Vanfossen v. Anderson, Garnishee.

benefit of creditors. The court further directed the jury, that the fact that some of the goods assigned were sold on credit, by the agents and servants of the plaintiff, after the assignment, was not sufficient to vitiate the same. And that the fact that Chandler, one of the grantors in the deed of assignment, was engaged in the store-house, in the capacity of clerk, was not, of itself, evidence of fraud in making the assignment.

The charge of the court in which these instructions are embodied, was excepted to by the defendant. We think, however, that the court has not erred in its charge, and that the instructions, as given, were unexceptionable.

Judgment affirmed.

8 251 83 548

VANFOSSEN v. ANDERSON, Garnishee.

Without a writ of attachment, a sheriff has no authority to notify a party that he is attached as garnishee, nor to take his answers to the interrogatories specified in section 1865 of the Code.

Nor has the district court power to render judgment upon a notice of garnishment thus given, and answers thus taken and returned.

Appeal from the Webster District Court.

Monday, April 11.

This action was commenced in Webster county, by plaintiff against one McInturff. An attachment was issued to the sheriff of the county, and returned served by attaching certain real estate. There is nothing to show that any writ was issued to Story county. It appears, however, that the sheriff of that county notified the appellant, Anderson, that he was attached as garnishee in said cause, and that he took the answer of said garnishee, and returned it to the district court of Webster county. A judgment was rendered against the defendant, and against the garnishee.

Frazier & Queal, for the appellant.

No appearance for the appellee.

WRIGHT, C. J.—This is a plain case. Without a writ of attachment, the shcriff of Story county had no authority or right to notify the appellant that he was attached as garnishee, nor to take his answers to the interrogatories specified in section 1865 of the Code. It is the writ, connected with the direction of the plaintiff to take the answers, that gives him the power to act in such cases, and without these, he can legally do nothing in the premises. The district court had no more power to render a judgment upon a notice given, and answers thus taken and returned, than if the same things had been done by a justice of the peace, a notary public, a road supervisor, or a private individual. The garnishee did not appear in the district court, nor was there anything in the notice, or other proceedings, to lead him to suppose that such appearance was necessary. For aught that is disclosed, the sheriff of Story county volunteered to notify him and take his answers. It was clearly irregular to render judgment against the garnishee under such circumstances. Code, sections 1855, 1861, 1864.

Judgment reversed.

THE STATE OF IOWA v. CHURCH.

Section eleven of article one of the constitution of 1857, did not deprive the district court of jurisdiction of offenses indictable under section 2612 of the Code, committed prior to the taking effect of the act entitled "An act qualifying the criminal jurisdiction of justices of the peace," approved March 12, 1858.

The act entitled "An act qualifying the criminal jurisdiction of justices of the peace," approved March 12, 1858, did not take away the jurisdiction of the district court, already attached, nor affect any proceeding already commenced in such court, under section 2612 of the Code.

In larceny, the jurisdiction of the district court, as well as that of justices of the peace, is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of a jury.

The statute of 1858, qualifying the criminal jurisdiction of justices of the peace, as well as the constitution, had in view the alleged, and not the ascertained, value of the property stolen, as conferring jurisdiction.

Where the jurisdiction of the district court has once attached, it cannot be taken away by the finding of a jury, that the value of the property stolen, did not exceed twenty dollars.

While the statute of 1858, qualifying the criminal jurisdiction of justices of the peace, makes the offense of larceny, where the value of the property stolen does not exceed twenty dollars, cognizable before justices of the peace, it does not take from the district court, its power to punish in cases of conviction before it, where the value of the property stolen, is ascertained by the jury not to exceed that sum.

Where an indictment for larceny, found at the November term, 1857, of the district court, and tried at the October term, 1858, charged the larceny of a heifer, of the value of twenty-five dollars, on the 14th day of October, 1857; and where the jury found the defendant guilty, and that the value of the property was fifteen dollars; *Held*, That the district court had jurisdiction of the offense.

Appeal from the Jasper District Court.

MONDAY, APRIL 11.

THE indictment in this case charges that "the defendant, on the 14th day of October, 1857, one brown heifer, of the value of twenty-five dollars, of the property of W. King, did steal, take and carry away." The indictment was found at the November term of the district court, 1857, and was tried at the October term, 1858. The jury found the defendant guilty, and that the value of the property stolen was fifteen dollars. The defendant moved the court to arrest the judgment, for the reasons:

- 1. That the court has no power to render judgment.
- 2. The court has no jurisdiction over the offense, of which the defendant has been found guilty.

The court overruled the motion, and adjudged that the defendant be imprisoned in the county jail for thirty days, and pay the costs of the prosecution.

W. H. & J. A. Seevers, for the appellant.

The constitution provides that offenses of a certain grade, shall be tried originally before justices of the peace, and that the latter have exclusive original jurisdiction in such cases. Constitution, Article 1, section 11. The Constitution requires the legislature to pass all laws necessary to carry the same into effect. Cons., Article 12, section 1. For the purpose of carrying out this requirement of the constitution, the legislature, at its last session, passed an act reducing the punishment in cases of persons convicted of petit larceny, so as to bring it within the constitutional requirement, that such class of offenses be prosecuted originally before justices of the peace. By the combined force of the constitution, and the laws of the last session, the district court was onsted of jurisdiction in such cases. Session Laws of 1858, 55.

The law of the last session was in force at the time the verdict was rendered, and contains no saving clause, exempting offenses committed previous to the taking effect thereof from the operation of the statute. By this statute, the punishment clause of section 2612 of the Code, prescribing the punishment in cases of petit larceny, is changed, altered, and repealed. The statute is in force; the crime exists; the Code defines it, but, in fact, prescribes no punishment — that is provided for by the law of last session. The law of the last session creates no crime, but merely provides a punishment for an offense previously created.

No judgment can be pronounced under a statute that contains no punishment clause, or where the same has been altered and changed, or under a repealed statute. But the statute must be in force, in all its parts, at the time judgment is pronounced. See Jones v. The State, 1 Iowa, 397; Yeaton v. United States, 5 Cranch., 281; The Irresistible, 7 Wheaton, 551; United States v. Preston, 3 Peters, 57; Commonwealth v. Marshall, 11 Pick., 350; Same v. Kimball, 21 Ib., 371; Butler v. Palmer, 1 Hill, 324; Fenelon's

Petition, 7 Barr., 173; Regina v. Fenton, 14 English L. & E., 124. If these authorities are law, then no judgment could be rendered in this case, under the punishment clause in section 2612 of the Code. That section defined and created the crime, but the punishment could only be ascertained by the laws of 1858.

But it is claimed by the state, that clause 1, section 26, of the Code, saves to the district court jurisdiction and power to pronounce judgment in this case. We do not so under-When it is once determined that the defendant, if stand it. punished at all, must be punished under the statute of 1858, the argument fails, for it proves too much. If section 26 of the Code has any effect at all, it is to inflict punishment under section 2612 of the Code, which, we think, cannot for a moment be entertained, and which, as we understand the attorney general, is conceded. We claim that section 26 of the Code itself provides that the rules for the construction of statutes therein laid down, shall not prevail where the same would be "inconsistent with the manifest intent of the legislature." We claim that the legislature, having passed the law of 1858, with no saving clause, the manifest intent must be that they did not intend to exempt offenses previously committed from the operation of the statute. For the purpose of carrying out the requirements of the constitution, the legislature passed the act of 1858. It is, then, a remedial criminal statute, and should have a liberal construction, and all cases and offenses fairly within the scope of the statute, should be judged by its provisions. gislature of the state, in their wisdom, have determined that all persons convicted of the crime of petit larceny, should be punished, &c. They have made no distinction between past and future offenses. Will, or can, this court do so? Why is not the defendant entitled to the lenity extended to such class of offenders, as well as those who are "going" to That he is, is the only equitable rule and construcoffend. tion.

We do not regard it as clear, that section 26 of the Code

has any reference to criminal proceedings. We maintain the contrary. If it is not clear, the defendant is entitled to the doubt. It is useless to attempt to elaborate this idea; it must be determined by a simple examination of the statute. We also suggest that section 2612 has not been repealed by the law of 1858, in such a manner, and to the extent necessary for the construction of statutes to prevail, laid down in section 26 of the Code.

S. A. Rice, (Att'y General), for the State.

- 1. Justices of the peace have exclusive original jurisdiction, in all criminal cases, where the punishment does not exceed one hundred dollars fine, or thirty days' imprisonment. Cons., Art. 1, sec. 11; State v. Kæhler, 6 Iowa, 398; State v. Rollet, 5 Ib., 535.
- 2. When this case was tried by the district court, by virtue of sec. 2, chap. 50 of the acts of 1858, the offense of petit larceny, of which defendant was found guilty, was cognizable before a justice of the peace.
- 3. At the time the indictment was found, the district court had jurisdiction of both grand and petit larceny, and, consequently, jurisdiction of this case. Code, secs. 2612, 2897.
- 4. Then the question is presented, whether the district court lost its jurisdiction in this case, owing to the passage of the act of 1858, chap. 50, sec. 2, there being no saving clause in the said act, of existing prosecutions. The principle is well settled by the following cases, that the repeal of a criminal statute, without a saving clause, bars not only future prosecutions, but also existing ones, and the court could not thereafter even render judgment on prosecutions commenced before such repeal: Com. v. Kimball, 21 Pick., 371; Com. v. Marshall, 11 Ib., 350; Butler v. Palmer, 1 Hill, 324; Jones v. State, 1 Iowa, 397; U. S. v. Preston, 3 Peters, 57.

- 5. This general principle of the law, it is claimed by the state, is not in force in this state, since the adoption of the Code; but, on the contrary, "any proceeding commenced under or by virtue of the statute repealed," is not affected by such repeal. Code, sec. 26, part 1.
- 6. The statute of 1858, sec. 2, chap. 50, entirely changes the penalty of petit larceny, therefore the provisions of 2612 of the Code, by which the penalty was fixed for this offense, being inconsistent with the subsequent law, is, by the terms of the latter law, repealed. Though called an amendment, it is a repeal, in fact. See *Com.* v. *Kimball*, 21 Pick., 376.
- 7. The term "proceeding commenced," as used in sec. 26 of the Code, includes civil as well as criminal suits. See title 24 Code, 386; secs. 2852, 3365, 3367; chap. 209, caption Code, 464.
- 8. This was a proceeding commenced, and of which the district court had jurisdiction, and which was pending therein, when the act of 1858, chap. 50, sec. 2, was passed, and, therefore, according to the foregoing principles, its jurisdiction in this case, was not affected by said act, and the court was fully authorized thereafter to proceed and try the cause.

STOCKTON, J.—When the indictment was found, the district court had jurisdiction of the offense charged. Under the statute, the offense was a felony, punishable by imprisonment in the penitentiary. Code, secs. 2612, 2817. What has occurred to take away this jurisdiction?

By the constitution of 1857, in force when the indictment was found, and when the offense is alleged to have been committed, it is provided that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, on information, without indictment, &c." Art. 1, sec. 11. By the act Vol. VIII—33

of March 12, 1858, sec. 2, section 2612 of the Code is so changed, as that when the value of the property stolen does not exceed twenty dollars, the punishment shall be by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. It is claimed that by force of the above cited provisions of the constitution, and of the statute, the district court has been ousted of its jurisdiction in the present case.

The effect of the constitutional provision was not to take away the jurisdiction of the district court, over offenses indictable under section 2612, even though the property stolen was of less value than twenty dollars. The punishment authorized to be imposed under that section, where the property stolen was of less value than twenty dollars, was both fine and imprisonment; and, consequently, such offense was not within the jurisdiction of justices of the peace, until, by the act of March 12, 1858, the punishment was changed, in order to bring the offense within such jurisdiction. But this act, in changing the punishment, did not take away the jurisdiction of the district court, already attached, nor affect any proceeding already commenced in the district court, under section 2612.

The jurisdiction of the district court in this case, could not be affected by the finding of the jury, that the property stolen was of less value than twenty dollars. The charge in the indictment was, that the property was of the value This gave the district court jurisof twenty-five dollars. diction. The rule contended for by the defendant, would, in its practical operation, lead to the greatest confusion. jurisdiction of the district court would be made to depend, not on the finding of the grand jury in the indictment, nor on the averments thereof, but on the finding of the petit jury on the question, whether the property stolen was, or was not, of the value of twenty dollars. property was of greater value than twenty dollars, the court had jurisdiction, and the proceedings were regular; but if the jury find that the property was not of such value, there

was no such jurisdiction, Certainly, no such absurdity as this, was intended by the law-making power.

The act of March 12, 1858, by reducing the punishment in cases of larceny, where the value of the property stolen does not exceed twenty dollars, from fine and imprisonment, to either such fine or imprisonment, has, by virtue of art. 1, sec. 11 of the constitution, conferred on justices of the peace, jurisdiction to try and punish such offenses. But the statute, as well as the constitution, had in view the alleged and not the ascertained, value of the property stolen, as conferring jurisdiction; and the jurisdiction of the district court, as well as that of the justice, is to be determined by the value alleged in the indictment or information, and not by the value ascertained by the verdict of the jury. Where the jurisdiction of the district court has once attached, it cannot be taken away by the finding of the jury, that the value of the property stolen did not exceed twenty dollars.

It is argued for defendant, that so much of section 2612 of the Code, as prescribes the punishment for larceny, where the value of the property did not exceed twenty dollars, having been repealed, there is no power in the district court to punish such offense, except under the act of March 12, 1858; that no judgment can be pronounced by such court, against a defendant convicted under a statute containing no penal clause; and that the statute must be in force, in all its parts, when the judgment is pronounced.

It is certainly competent for the legislature to change the punishment prescribed for offenses. But the change made by the law of March 12, 1858, while it renders the offense of larceny, where the value of the property stolen does not exceed twenty dollars, cognizable before a justice of the peace, does not take from the district court its power to punish in cases of conviction before it, where the value of the property stolen is ascertained by 'the jury to exceed that sum.

Judgment affirmed.

Richardson & Co. v. The Burlington and Missouri River Railroad Co.



RICHARDSON & Co. v. THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY.

Where notice of the taking of a deposition in Mount Pleasant, Henry ry county, on the 26th of July, 1858, was served on the attorney of the defendant, in DesMoines county—a distance of thirty miles from the place where the deposition was to be taken—on the 21st of July; Held, That the notice was not sufficient.

The service of an original notice against a railroad company, upon the track master of the company, where, it appears that the corporation has officers, is not sufficient to give the court jurisdiction of the company.

A track master of a railroad company, is neither an officer nor a clerk, engaged in the active management of the ordinary business of the corporation, within the meaning of section 1727 of the Code, nor a president or secretary, as provided for in section 17 of the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853.

A railroad corporation, in legal contemplation, resides in the counties through which its road passes, and in which it transacts its business, and may be sued in any county through which the road passes.

Where in an action against a railroad company, commenced in the county of Henry, the defendant moved for a change of venue to the county of DesMoines, on the ground that they were a corporate body, organized under the laws of the state of Iowa, and have their principal place and officers for transacting their business, at Burlington, DesMoines county, and so had at the time this suit was commenced; that the original notice was served on defendants, in said DesMoines county, by service thereof by the sheriff of said county, on J. G. T., treasurer of defendant, at his office in Burlington, and on the track master in Henry county, and in no other way or manner; and that the present suit is about a matter growing out of, and connected with, the said office, which motion was sustained, and the venue changed accordingly; Held, That the court erred in changing the venue.

Appeal from the Henry District Court.

Monday, April 11.

THE plaintiffs appeal from the orders of the district court, suppressing a deposition, and awarding a change of venue. For the facts, see the opinion of the court.

Ambler & Woolson, for the appellants, cited Baldwin et

Richardson & Co. v. The Burlington and Missouri River Railroad Co.

uz. v. The M. & M. Railroad Co., 5 Iowa, 518; Bristol v. Chicago and Aurora R. R. Co., 15 Ill., 436.

D. Rorer, for the appellees, cited Code, 329; Bddiucum v. Kirk, 3 Cranch, 293; Bank of U. S. v. McKinsey, 2 Brock., 393; Louisville, C. & Ch. R. R. Co. v. Letson, 2 How., 497; Angel & Ames on Corp., 97; Ib., sec. 407.

WRIGHT, C. J.—A notice was served on defendant's attorney, in Des Moines county, on the 21st of July, 1858, informing him that plaintiffs would proceed to take the deposition of one Crawford, in Mount Pleasant, Henry county, on the 26th of that month. The deposition was taken on the day named. There was no appearance for defendants. A motion was made to exclude, at the next term, upon the ground, among others, that the time given in the notice, was not sufficient. This motion was sustained, and, as we think, properly.

The notice required, in such cases, is, at least, five days, and when taken in the manner adopted in this instance, (an examination without a commissioner), one day in addition is to be allowed for every thirty miles travel from the place where the notice is served, to the place where the deposition is to be taken. Code, section 2453. The rule given for the computation of time, is to exclude the first day and include the last. Section 2513.

The deposition was taken in Mount Pleasant, and the notice served in Burlington. It is conceded, and we know, that the distance between the two places is near thirty miles. The party was entitled, therefore, to at least six days notice. If we exclude the 21st, (the day of service), we would have but five days up to, or including the 26th, the day of the taking. There was not sufficient time, and the deposition was properly excluded. The other question made as to this part of the case, we need not examine,

The plaintiffs sue for a large amount of wood, sold and delivered to defendant under a written contract, a copy of which Richardson & Co. v. The Burlington and Missouri River Railroad Co.

is annexed to the petition, and for damages resulting to them from the failure and refusal of defendant to receive other wood mentioned in said contract. This agreement, or contract, provides that plaintiffs are to deliver, by a time named. one thousand cords of wood, on the premises of defendants in Henry county, for which the plaintiffs were to be paid \$1,80 per cord, "in monthly payments, according to the estimates of the agent," and upon the delivery of the whole amount, the further sum of 45 cents per cord. An attachment issued, which was served in Henry county, upon certain personal property. A notice was placed in the hands of the sheriff of Henry county, who returned it served. "by reading to one Mr. Hinkle, the track master of said railroad company, and who was in charge of the property of defendant." The sheriff of Des Moines county served an original notice, also, upon the local treasurer of the company.

A motion was filed by defendants for a change of venue to Des Moines county, for the reason that "they are a corporate body, organized under the laws of the state of Iowa, and have their principal place and officers for transacting their business, at Burlington, Des Moines county, and so had at the time this suit was commenced; that the original notice was served on defendants, in said Des Moines county, by service thereof by the sheriff of said county, on John G. Foote, treasurer of defendants, at his office in Burlington, and on the track master in Henry county, and in no other way or manner; and that the present suit is about a matter growing out of, and connected with, the said office." This motion, as stated in the record, was supported by testimony, and the venue, therefore, changed as prayed.

Service upon the track master was not sufficient. It appears that the corporation had officers, and he was neither an officer nor a clerk, engaged in the active management of the ordinary business of the corporation, within the meaning of section 1727 of the Code, nor a president or secretary, as provided for in section 17, Laws 1853, 62. Not

only so, but if the residence of defendants was Des Moines county, the service, though sufficient, would not compel them to submit to the jurisdiction of the court in Henry county, after demanding a change of venue. It is only where a party is a non-resident, that he may be sued in any county, other than that of his residence, in which he may be found. Code, section 1701.

The material question is, whether defendants had a residence in Henry county. And this must be regarded as settled, by the case of Baldwin & Wife v. M. & M. R. R. Co., 5 Iowa, 518. It was there held that a corporation, (like a railroad company), in legal contemplation, resides in the counties through which the road passes, and in which it transacts its business; that it has a legal residence where it exercises corporate power and privileges. This case is like that in its essential features. This company is as much engaged in prosecuting the enterprise for which it was brought into being, in the county of Henry, as in the county of Des Moines. It there operates its road, and exercises corporate powers and functions, and there it may be sued.

It is unnecessary to determine whether the place of payment or performance, is so fixed by the terms of the contract upon which suit is brought, as to authorize the action to be brought in Henry county, under section 1704 of the Code. Upon the ground above stated, we conclude that the venue was improperly changed, and the order to that effect will be reversed.

DUNGAN v. VON PUHL.

8 203 116 57

The proceedings authorized by chapter eighty of the Code, were designed to enable the occupying claimant of land, under color of title, who has, in good faith, made valuable improvements thereon, and who is afterwards, in the proper action, found not to be the rightful owner thereof, to have his improvements appraised, that he may obtain payment therefor, or in

- default of such payment being made, in the time fixed by the court, to enable the claimant to acquire the title to the land, by paying to the owner its appraised value, aside from the improvements.
- As indispensable to the remedy designed to be afforded by the statute in relation to occupying claimants, it is required that the value of the land, aside from the improvements, as well as the value of the improvements themselves, shall be ascertained by the jury, unless such value is agreed upon by the parties.
- When the appraisement is made, no personal judgment for the ascertained value of the improvements, can be rendered by the court, against the owner of the land.
- It is not the intention of the statute in relation to occupying claimants, that a personal judgment should be rendered in favor of either party, or that the lands or improvements should be ordered to be sold to pay such judgment.
- Where in a proceeding by an occupying claimant, to recover payment for his improvements, the petition prays judgment for the value thereof against the defendant, the court possesses no power to render such a judgment; and the rendition of such a judgment, without questioning the right of the court, is not a waiver of all objections to such a judgment by the defendant; nor is he precluded from objecting to such a judgment, for the first time, in the appellate court.
- Upon rendering judgment, under the law in relation to occupying claimants, for the value of the improvements upon land, owned by another, the court possesses no power to order that the land be sold under a special execution to be issued on the judgment.
- While the act entitled "An act to amend chapter 80 of the Code," approved March 23, 1858, is made to apply to judgments rendered previous to its passage, it cannot have the effect to render valid, a judgment in personam against the owner of land, for improvements made thereon by an occupying claimant, nor an order for the sale of the land under a special execution to be issued on such judgment.
- Where land is enclosed and put in a state suitable for cultivation, and the raising of crops, a value is added to the land above the mere costor value of the improvements put upon it; and the occupant may reasonably be charged a fair sum for the use and occupation of the land in its improved state. In such a case, he pays rent, not upon the improvements, but upon the land worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation.
- In cases under the law in relation to occupying claimants, the owner is entitled to the rents and profits according to the value of the land, for the purpose to which it is devoted by the occupant; and the occupant is to pay what the use of the land is worth to him.
- Under our statute, the occupant of land under color of title, who is found not to be the rightful owner thereof, is to be paid for valuable improve-

ments, made by him in good faith—their value to be ascertained by their worthat the time the appraisement is made; and as resulting from this rule, he should not be charged with the rent of the improvements made by him, but should pay whatever the land has been worth to him. The estimate should be made upon all the land brought into a state of cultivation by him, and suitable for the raising of crops, or for farming purposes, but no rent is to be charged for the use of buildings or farm fixtures erected by the occupant; and a deduction is to be made, for any injury done to the land, by cutting timber, or otherwise, by the occupant while in his possession.

Appeal from the Des Moines District Court.

TUESDAY, APRIL 12.

Von Puhl recovered judgment against Dungan for the possession of a tract of land in Lee county, and this suit is brought by Dungan to stay execution of the judgment, and to obtain payment for the improvements on the land, under chapter 80 of the Code of Iowa.

The petition states the value of the improvements to be \$1,500; and the value of the land, aside from the improvements, to be \$2,500; and prays judgment against the said Von Puhl for the value of the said improvements, with costs, &c. The defendant put in a general denial of the allegations of the petition, and sought to set-off against the plaintiff's claim for improvements, the sum of \$1,600, for the rents and profits of the land for six years next prior to the commencement of the action for the recovery of the land.

The jury, under the direction of the court, found a verdict for the plaintiff, and assessed the damages at twelve hundred dollars. For this amount, judgment was rendered against the defendant, Von Puhl; and the court further ordered that the land be sold to satisfy the judgment, and that a special execution issue for that purpose.

Rankin, Miller & Enster, for the appellant, cited Steele v. Spruance, 22 Penn. State, 260; Bell's Heirs v. Burnett,

Vol. VIII.-34

2 J. J. Mars., 519; Jones v. Jones, 4 Gelm., 87; 6 Ford, (N. H.) 41; Code, 2008, 2023.

M'Creary & Bruce, for the appellee, relied on M'Gregor, Laws & Blackmore v. Armill, 2 Iowa, 30; Schlencher v. Risley, 3 Scam., 448; Elliott v. Armstrong, 4 Blackf., 424; Haskins v. Spelter, 1 Dana, 177; 3 Ib., 574; Pangburn v. Ranney, 11 Johns., 141; Close v. Stewart, 4 Wend., 95; Dunham v. Simmons, 5 Hill, 507.

STOCKTON J.—It is first assigned for error, that the district court rendered judgment in personam against the defendant, and ordered the land to be sold under a special execution.

We have no doubt but that the action of the court in this respect, was erroneous. The proceedings authorized to be had under chapter 80 of the Code, were designed to enable the occupying claimant of land, under color of title, who has, in good faith, made valuable improvements thereon, and who is afterwards, in the proper action, found not to be the rightful owner thereof, to have his improvements appraised, that he may obtain payment therefor, or in default of such payment being made in the time fixed by the court, to enable the claimant to acquire the title of the land, by paying to the owner its appraised value, aside from the improvements. As indispensable to the remedy designed to be afforded by the statute, it is required that the value of the land, aside from the improvements, as well as the value of the improvements, shall be ascertained by the jury, unless such value is agreed upon by the parties.

When the appraisement is made, no personal judgment for the amount ascertained, can be rendered by the court. The statute provides that the plaintiff in the main action, may pay the appraised value of the improvements, and take possession. If he fails to make payment in the time fixed by the court, the owner of the improvements may pay the appraised value of the land, and keep possession of both. Sections 1236-8. It is wholly aside from the intention of

the statute, that a personal judgment should be rendered in favor of either party, or that the land or improvements should be ordered to be sold to pay such judgment. So, the proceedings are defective and imperfect, if the value of the land is not ascertained, as well as of the value the improvements.

The plaintiff, as required (section 1234), avers in his petition that the land, aside from the improvements, is worth \$2,500. But the parties seem to have made noissne on the value of the land. Aside from general denial of the allegations of the petition, no notice is taken in defendant's answer, of this averment of the petition, and there is no finding by the jury of the value of the land. Indeed, the parties seem not to have supposed such finding necessary, or that it comprised, in any sense, an essential part of the proceedings in the cause.

It is argued by the plaintiff, that as the petition prays judgment against the defendant for the value of the improvements; and as defendant takes issue upon the alleged value of the same, without questioning the right of the court to render such a judgment, he has thereby waived all objections to the judgment in personam. And that, as no such objection was made in the district court, the defendant cannot, in this court, first make the question as to the nature or form of the judgment rendered.

Although the petition of the plaintiff prays judgment against the defendant for the value of his improvements, yet it seems, in other respects, drawn with special reference to chapter 80 of the Code, and to the relief designed to be afforded by that chapter to the occupying claimant. The plaintiff expressly prays that no execution may issue on the judgment to put the defendant in possession of the land, until the provisions of said chapter 80 are complied with.

The relief sought, then, was such only as might be granted to the occupying claimant consistent with the object and spirit of the statute, and no power or jurisdiction to render a judgment in personam, was conferred upon the court by

the prayer for such judgment in the petition. The court could make such final adjudication only as the statute authorized; and a judgment in personam was erroneous, though prayed in the petition, and not specially objected to by defendant.

We are quite as clear that the district court, upon rendering judgment against the defendant, had no authority to make the further order that the land be sold under a special execution to be issued on the judgment. At the date of the proceedings, there was no law in existence to authorize any By the act of March 23, 1858, the owner such execution. of the title to the land, is allowed three years within which to pay the occupying claimant the appraised value of his improvements; if he does not make payment within that time, the owner of the improvements may issue execution for the value of the same, which may be levied on the land or on any other property of the owner of the title, not exempt from execution. Session acts, 330. This act is made to apply to judgments rendered previous to its passage, but it cannot have the effect to render valid, as claimed by the plaintiff, the judgment and order of the district court in this cause.

We come next to the ruling of the court, as to the rents and profits with which the plaintiff is to be charged. The court instructed the jury, that the defendant was entitled to recover rents and profits for the use of his land, which were to be set-off against the improvements; and that, in estimating such rents and profits, they were not to consider the improvements made by plaintiff, but were to allow for the rent of the land in its unimproved state.

No question was made in the district court, nor is any made in this court, as to the right of the defendant in this proceeding, to set-off the rents against the plaintiff's claim for the improvements on the land. His right to do so has been acquiesced in, as though the same was as well settled as his right to set-off any injury to the land, by cutting timber, or otherwise, against the claim of the occupant for im-

provements made. Code, section 1241. Admitting that defendant was entitled to set-off the rents and profits of the land, in this proceeding, against the plaintiff's claim for the value of his improvements, we think there was error in the charge of the court, in the rule established for estimating the value of the rents and profits.

In the early settlement of the western country, the use and occupation of unimproved prairie or timber land, would, as a general rule, be considered of no value. The annual rents and profits of such land would be considered nothing. But if the land is enclosed, and put in a state suitable for cultivation and the raising of crops, not only is a value added to the land above the mere cost or value of the improvements put upon it, but the occupant may reasonably be charged a fair sum for the use and occupation of the land in its improved state, without having the right to complain that he is required to pay rent for improvements made by himself. He pays rent, not upon such improvements, but upon land, worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation. The owner is entitled to rents and profits according to the value of the land, for the purpose to which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule, we think, there will nothing be found inequitable. It does not require the occupant to pay rent on improvements made by himself. it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor. It is difficult to lay down a rule that will work alike fairly and equitably in all cases-of land improved by inclosure, and by being rendered suitable for the raising of crops, and of an unimproved lot in a town or city. All that we can say is, that the occupant is to be charged for the rents, whatever the use of the property has been worth to him, whether it be prairie land or a vacant city lot. While he has the right to claim payment for the

value of his improvements, he cannot complain of being held to pay, as rents and profits to the owner, all that the property has been worth to him, nor in being held to the rule that the value of such rents may be increased by the labor he has placed upon it.

In Bell's Heirs v. Burnett, 2 J. J. Mar., 516, a purchaser who had acquired title to land, and entered upon it in good faith, on yielding possession to the better title, was allowed actual, or prime cost for his improvements, and was charged with rent of the lands and of the improvements annually, as they were made.

In Haskins v. Spiller, 1 Dana, 170, a claimant under a will, in which he was pretermitted, obtained a decree for his share of the land. It was held, that if any improvements should fall in the portion allotted to him, he must compensate the proprietor therefor, according to the enhanced value the improvements may have given to his share, at the time of making the allotment, subject to a deduction for the waste and deterioration the soil may have suffered from use, and of a reasonable rent for the occupancy of his share while in possession of defendants, according to the assessed value of the rent, if anything; provided the land had remained in the situation it was in when the defendants took possession. The same case was again before the Court of Appeals of Kentucky, in 3 Dana, 573, and it was held, that defendant was to be paid for his improvements according to their deteriorated value, (not their actual cost), and that the estimate of the rent, was to be made with refence to the condition of the land when the occupant entered upon it.

In Barnett v. Higgins, 4 Dana, 565, the occupant was allowed for improvements, at their estimated value, when new—and the court held it proper, under the circumstances, to allow the owner of the land, rents upon the land from the time it was put in cultivation and used by the occupant.

In Whitings v. Taylor, 8 Dana, 441, it was held that although the complainants could not, against the plea of the

statute of limitations, recover rents for more than five years before the commencement of the suit, they were entitled to set off the rents and profits of the previous years, and of the whole period of defendant's occupancy, as far as might be necessary, against the claim of the defendants to be compensated for ameliorations to the land, or for improvements made upon it in good faith.

We think the rule to be gathered from the Kentucky cases, is this: that where the occupant is allowed for the actual value of his improvements, or their value when made, he is to pay for the use and occupation of the same. But where the improvements are estimated according to their deteriorated value, when possession is given, the occupant is not to be charged with the use of the same, but only for the rent of the land, without the improvements.

In Elliott v. Armstrong, 4 Blackf., 424, possession was recovered of a town lot. The occupant was allowed two thousand dollars for improvements placed thereon by himself. The court held that he was entitled to the use of the buildings free of rent, because they were erected at his own expense; and he was to be charged with rent of the let, without improvements.

In Montgomery v. Chadwick, 7 Iowa, 114, it was held by this court, that a mortgagee of a town lot in possession, was to be paid for the cost of erections made by him, and was to be charged with rents upon the lot and improvements.

Under our statute, the occupant of land under color of title, who is found not to be the rightful owner thereof, is to be paid for valuable improvements, made by him in good faith; and their value is to be ascertained by their worth at the time the appraisement is made. As resulting from this rule, we think he should not be charged with the rent of the improvements made by him, but should pay whatever the land has been worth to him. The estimate should be made upon all the land brought into a state of cultivation by him, and suitable for the raising of crops, or for

James v. Arbuckle.

farming purposes; but no rent is to be charged for the use of buildings or farm fixtures erected by the occupant. And a deduction is to be made for any injury done to the land, by cutting timber or otherwise, by the occupant, while in his possession.

Judgment reversed.

JAMES v. ARBUCKLE.

Where a party asks for the continuance of a cause, on the ground of the absence of a witness, whose residence he does not know, he should show either that he has not had time to ascertain the residence of the witness, or that he has used proper diligence to ascertain his residence.

Where in an action commenced before a justice of the peace, it appears that no defense was made before the justice, no object is to be gained by granting a continuance in the district court, on appeal, on the ground of the absence of a witness.

Action commenced before a justice of the peace, in April, 1856, to which the defendant made no defense, and judgment was rendered against him. On appeal, and in September, 1857, the defendant filed in the district court an affidavit for a continuance, on the ground of the absence of a witness, stating in his affidavit "that said witness resides somewhere in the state of Illinois, but the county I am not able to state, at present," which application was overruled; Held, That the continuance was properly refused.

Appeal from the Pottawattamie District Court.

Tuesday, April 12.

This action, upon a promissory note, was commenced before a justice of the peace. The defendant was served, but made default and appealed. In the district court, he filed an affidavit for a continuance, upon the ground of the want of the testimony of a witness, under section 1766 of the Code. The affidavit seems to be complete in form, unless upon the residence of the witness, upon which it says, "that said witness resides somewhere in the state of Illinois, but

James v. Arbuckle.

the county, I am not able to state at present." The action was commenced in April, 1856, and the affidavit for a continuance, filed in September, 1857. The application for the continuance was overruled, and judgment rendered against the defendant, from which he appeals.

- Ingersoll and C. E. Stone, for the appellant.

No appearance for the appellee.

WOODWARD, J.-It appears from the argument of the appellant, that the motion was overruled, because the affidavit did not conform to the statute, in stating the residence of the witness. The affiant states that the witness resides in the state of Illinois, but he does not yet know the county. However the question of sufficiency might be regarded, if the action were recently commenced, it is to be taken in connection with the question of diligence, and it appears that the action was brought before a justice of the peace in April, 1856, and after an appeal, in September, 1857, the defendant files this motion, and does not show the use of any diligence whatever to ascertain the residence of the witness. After the lapse of so much time, he should show, either the residence, and a reason why he has not obtained the testimony, or else the use of proper diligence. he does not do.

But there is another ground upon which the application would seem to have been correctly overruled, and it may have been the ground upon which the court decided. The defendant had set up no defense. He filed no answer, nor does the justice's docket show an oral one, but on the contrary, states that there was no defense, and we should infer that defendant made default. Neither was there an answer offered in the district court, assuming, for the moment, that this might be done. In this state of the case, then, with a default—with no issue, oral or written—no defense put in—there was no object in a continuance.

The judgment of the district court is affirmed. Vol., VIII.—35

Hurley v. The Dubuque Gas Light & Coke Company.

HURLEY v. THE DUBUQUE GAS LIGHT AND COKE COMPANY.

Where the plaintiff, at the November term, 1856, of the Dubuque district court, recovered a judgment against the defendant for about the sum of \$1,000; and where, at the July term, 1858, a motion was made by the plaintiff to correct the record of said judgment, in such a manner as to show that plaintiff's mechanic's lien was established upon a certain tract of land, describing it—which motion was sustained; and where it appeared from the record, that in 1855, plaintiff filed his petition; that afterwards other papers were filed, all of which were lost or mislaid; that the affidavit of plaintiff was filed, to the effect that his petition, among other things, contained a prayer for a mechanic's lien, as well as for judgment upon his claim; that due notice of said motion had been given to the attorneys of the defendant, and that they made no objection to the granting of the motion; and that it appeared to the court that said application was reasonable, and substantial justice required the correction of said entry; Held, That under the circumstances of the case, the court, in correcting the judgment, did not exceed the power conferred by section 1580 of the Code.

Appeal from the Dubuque District Court.

Tuesday, April 12.

THE PLAINTIFF, at the November Term, 1856, recovered judgment against defendant, for near the sum of one thou sand dollars. At the July term, 1858, a motion was made by plaintiff, to correct the record of said judgment, in such a manner as to show that plaintiff's mechanic's lien, was established upon a certain tract or parcel of land, which is fully described. This motion was sustained, and defendants appeal.

Monroe & Jones and Lovells & Williams, for the appellant.

David S. Wilson, for the appellee.

WEIGHT, C. J.—Without examining the authorities cited by counsel for the respective parties, upon the general question of the power of a court to amend or correct its records, Hurley v. The Dubuque Gas Light and Coke Company.

after the adjournment of the term at which they are made, it is sufficient for the purposes of the present case, to say, that the Code provides, "that entries made, approved and signed at a previous term, may be altered only to correct an evident mistake." Section 1580. The only question is, whether the court below in directing this amendment, exceeded the power conferred by this section.

Whatever view we might take of the simple inquiry, whether the alteration or correction made, was the supplying an evident omission, within the meaning of the law, there are facts connected with this record, which lead us to conclude, that we would not be justified in interfering with the order made. We decide the case more upon its own circumstances, than upon the general principle.

It appears that in 1855, plaintiff filed his petition, and that afterwards, other papers were filed, all of which, (the petition and other papers), are lost or mislaid. What these papers contained, we do not know, except that the record making the correction, sets out that the affidavit of plaintiff was filed, to the effect that his petition, among other things, contained a prayer for a mechanic's lien, as well as for judgment upon his claim. The record further recites, that due notice of said motion was given to the attorneys for defendants; that they made no objection to the granting of the same; and that it appeared to the court that said application was reasonable, and that substantial justice required the correction of said entry.

Two considerations are sufficient to justify the affirmance of the order.

The first is, that the attorneys of defendants had due notice of the application, and made no objection to the correction. The case does not stand as the ordinary one of a judgment by default, where a party is held not to be concluded by what is done in his absence. It is different: First. Because the language—"and it appearing that due notice of this application had been given to the attorneys of the Dubuque Gas Light and Coke Company, Messrs.

Hurley v. The Dubuque Gas Light and Coke Company.

Smith, McKinley & Poor, and they making no objection to the granting of the motion," fairly implies that they were present; and, Second. If they had not been present and virtually, and in fact, assenting to said amendment, inasmuch as they did not oppose it, the record would have either been silent in this respect, or stated that the motion came on for hearing, and that defendants not appearing, &c. But this view is sustained, in the third place, from the fact that no exception was taken, or objection made, to the action of the court at the time. The inference is almost, if not quite, legitimate, that the correction was made by consent.

But the second consideration grows out of the imperfect, or incomplete state of the record. What would amount to an evident mistake, within the meaning of the section quoted above, must, of course, depend upon an examination of all parts of the record. And cases can be readily conceived, in which it would be very important to know the issues made by the pleadings; that the facts admitted and denied, might be fully understood. And yet, in the case before us, we know nothing of the pleadings subsequent to the petition. The court below, though these pleadings were subsequently mislaid, is supposed to have acted from knowledge gained of their contents, at the time of entering the judgment in 1856, and with this knowledge, it is certified to us that the application was reasonable, and that substantial justice required the correction. It is impossible for us to say, that under such circumstances, the court below had not sufficient data, from the record actually present, and the knowledge possessed of that which was lost (but of which we know nothing), to justify the correction How it might be, if all the pleadings or records were placed before us, or if a showing had been made by the parties, setting out the substance of such pleadings, or lost portions of the record, according to their best recollection and belief, so as to bring them to our knowledge, we do not undertake to say.

The suggestion that the law contemplates that such corrections shall be applied for at the term next succeeding the one at which the entry was made, is substantially correct. We do not say that, under no circumstances, could the correction be made at the second or third term, if opposed. The policy of the law, as well as a due regard to the rights of all parties interested, would dictate that such application should be at an early day. If the correction may be made at a second, or later term, then, of course, the mistake would have to be made more and more evident and manifest, and the court should be fully and entirely satisfied that no prejudice could result therefrom. Where, however, it is made, as in this instance, without opposition, or by consent, then we are clear that it may be made at any time.

How far, if at all, the correction made may affect the rights of third persons, which may have grown up since the rendition of judgment in 1856, it is not necessary, and, of course, we do not undertake to determine. We decide the question as between the parties to this record, and for this case.

Judgment affirmed.

THE BANK OF THE OLD DOMINION v. THE DUBUQUE & PA-CIFIC RAILFOAD COMPANY.

Where a trustee, acting for others, sells an estate, and becomes interested in the purchase, the *cestui que trust* is entitled, in a court of equity, to set aside the purchase, and have the property re-exposed to sale.

Whether the cestui que trust be an infant or an adult, and whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate.

In such a case, in order to set aside the sale, the cestui que trust is not bound to prove, nor the court to judge, that the trustee has made a bargain advantageous to himself.

It is to guard against the uncertainty of the cestui que trust being able to prove fraud in the sale, and the hazard of abuse, as well as to remove

the trustee from temptation, that the rule permits the cestui que trust to come, at his own option, and without showing actual injury, insist upon having the experiment of another sale.

The plaintiff loaned to the defendant, \$20,000, for which it gave its obligations, in the shape of acceptances, payable at its office in the city of New York, in ninety and one hundred and twenty days, and to secure the payment of the same at maturity, according to agreement, forwarded to the plaintiff thirty-four "Land Grant Construction Bonds," of said defendant, of one thousand dollars each, to be held by the plaintiff as collateral security for the payment of the money loaned. The acceptances were not paid at maturity, but were protested for non-payment, and remain wholly unpaid. The plaintiff sent the bonds of the defendant to the city of New York, with directions to have them sold at the stock exchange in said city, at public outcry, to the highest bidder, and directed a friend to see that the interests of the plaintiff were protected in the sale. Upon due notice to the defendant, the bonds were sold as directed, and the whole of them bid in for the plaintiff at the sum of \$5,477 86. In an action on the acceptances, to recover the balance due, after deducting the amount realized by the sale of the bonds; Held, 1. That the plaintiff had power to sell the bonds for the payment of the debt, and that a sale to a third person would have passed the property; 2. That the plaintiff itself could not become the purchaser, and nothing passed by the form of a sale at auction in which the bonds were bid in by the plaintiff; 3. That the bonds must be considered as still held by the plaintiff, under its original title, as collateral security for the payment of the money borrowed by the defendant.

Appeal from the Dubuque District Court.

TUESDAY, APRIL 12.

THE Bank of the Old Dominion loaned to the Dubuque & Pacific Railroad Company, twenty thousand dollars, for which the company gave its obligations, in the shape of acceptances, payable at the office of the company in the city of New York, in ninety and one hundred and twenty days. To secure the payment of the same, at maturity, the railroad company, according to agreement, forwarded to the bank thirty-four "land grant construction bonds" of said company, of one thousand dollars each, to be held by the bank as collateral security for the payment of the money loaned.

The acceptances were not paid at maturity, but were protested for non-payment, and still remain wholly unpaid. The bank sent the bonds of the railroad company to the city of New York, with directions to have them sold at the stock exchange in said city, at public outcry, to the highest bidder, and with directions to a friend, to see that the interests of the bank were protected in the sale. Upon due notice to the railroad company, the bonds were sold as directed, and the whole of them were bid in for the bank, at the sum of \$5,477 86.

This suit is brought by the bank, to recover of the rail-road company, the balance due on the said acceptances, dededucting the amount realized by the sale of the bonds. Upon this agreed statement of facts, the district court was called upon to decide as to the validity of the sale of the bonds, and, according as it might be of opinion, to render judgment for the whole amount due on said acceptances, or for such sum as might be due thereon, deducting the sum realized by the plaintiff from the sale of the bonds. The district court was of opinion, that the sale of the bonds was valid, and vested the title thereto in the bank, and rendered judgment accordingly for the plaintiff, for \$16,818 0°, from which the defendant appeals.

Platt Smith, for the appellant, cited Middlesex Bunk v. Minott, 4 Metc., 329; 1 Pars. on Cont., 601; 1 Story's Eq., secs. 308, 322; Wilson v. Little, 2 Comst., 443.

Samuels, Allison & Crane, for the appellee. [The reporter found no brief of the counsel for appellee, upon the files.]

STOCKTON, J.—For the railroad company, it is contended that the purchase of the bonds by the bank, was illegal and unauthorized, and that the title did not pass by the sale, but remains in the railroad company, subject to the original agreement between the parties. For the bank, it is contended

that the title of the bonds became absolute in the bank by the purchase.

There can be no doubt of the power and authority of the plaintiff to sell the bonds of the railroad company, for the payment of the debt; and a sale to a third person, would have passed the property. But, as was held in the case of the *Middlesex Bank* v. *Minott*, 4 Metc., 325, the bank could not itself become the purchaser; and nothing passed by the form of a sale at auction, in which the bonds were bid in by the plaintiff. They must be considered as still held by the bank, under its original title, as collateral security for the money borrowed by the railroad company.

The relations existing between the trustee and cestui que trust, and, as resulting therefrom, the principles establishing the rights of the parties in this case, have been very fully examined by Chancellor Kent, in Davone v. Fanning, 2 Johns. Ch., 258, in which it is held, that if a trustee, acting for others, sells an estate, and becomes himself the purchaser, the cestui que trust is entitled, in a court of equity, to set aside the purchase, and have the property reexposed to sale. And whether the cestui que trust be an infant or an adult, and whether the sale be public or private. the trustee is equally disabled from becoming a purchaser of the trust estate. However innocent, says the Chancellor, the purchaser may be in the given case, it is poisonous in its consequences. The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and the party not have it in his power to show it. There may be fraud, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse. and to remove the trustee from temptation, that the rule does, and will, permit the cestui que trust to come, at his own option, and without showing actual injury, insist upon having the experiment of another sale. 1 Story's Eq., sec. 322; Story on Bailments, sec. 319; 1 Pars. on Cont., 602. Snell v. Kimmell.

The judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment for the amount due the plaintiff on the acceptances; and the farther judgment that the plaintiff holds the bonds of the railroad company, under the original agreement of the parties, as collateral security for the payment of the amount borrowed by the company—the purchase of the said bonds by the plaintiff being held invalid.

Judgment reversed.

Snell v. Kimmell.

Where in an action on a promissory note, as follows: \$181 86. Twelve months after date, we, or either of us, promise to pay S. & B., or order. one hundred and eighty-one dollars and eighty-six cents, for value received, to draw ten per cent. interest from date, if not punctually paid. February 10, 1857," in which the defendants pleaded usury, the plaintiff called one of the defendants as a witness, who testified that in February, 1857, he executed a note to plaintiffs—he thought about the 1st of February, but would say about the 4th, 5th, 6th, 7th or 8th-for the sum of \$180 and some cents, or for \$181 and some cents—he thought it was eighty cents; that one M. signed the same as surety; that it was given for \$100, and a note of his own for \$29 80; that the words did not contain any words relating to prompt payment-did not draw ten per cent. interest-nor was there a promise to pay interest; that if there was, he thought he should remember it; that he owed no other note to S. & B.; and that the note was payable in one year from date; and where the court held that the evidence failed to establish the identity of the note and rendered judgment for the plaintiff for the amount of the note sued on; Held, That the note was sufficiently identified, and that the finding of the court was erroneous.

Where a cause is tried by the court, without a jury, and the finding of the court is in writing, and all the testimony is set out in the record, the appellate court may review the finding of the court below, in like manner as it may re-examine the verdict of a jury, on a motion to set aside the verdict, on the ground that it is not supported by the evidence.

Where a cause is tried by the court, without a jury, and the finding of the court is reduced to writing, and all the testimony, with the exceptions of

Vol.VIII.—36

Snell v. Kimmell.

the party complaining, is set out in the record—all of which is signed by the judge who tried the cause, the paper is to be treated as a bill of exceptions.

Appeal from the Webster District Court.

TUESDAY, APRIL 12.

An action on a promissory note, which read as follows: Twelve months after date, we, or either of us, promise to pay Snell & Butterworth, or order, one hundred and eighty-one 86-100 dollars for value received, to draw ten per cent. interest from date, if not punctually paid. February, 10, 1857," to which the defendant filed a plea of The cause was tried by the court, and the only evidence offered was the testimony of Kimmell himself, who, the record says, was called by the plaintiffs. Kimmell testified that in February, 1857, he executed a note to the plaintiffs - he thought about the first of February, but would say about the 4th, 5th, 6th or 8th—for the sum of \$181, and some cents, or for \$181, and some cents—he thought it was eighty cents; that one W. N. Messervey signed the same as surety; that it was given for one hundred dollars, and a note of his own for \$29 80; that the note did not contain any words of (relating to) prompt payment did not draw ten per cent. interest-nor was there a promise to pay interest; that if there was, he thought he should remember it; that he owed no other note to Snell & Butterworth; and that the note was payable in one year from date.

The finding of the court is in writing, and all the testimony is set forth. The court was of opinion that the evidence failed to establish the identity of the note, satisfactorily, and rendered judgment for the plaintiffs.

Hull & Dennison, for the appellant.

J. A. Kasson and D. O. Finch, for the appellee.

Snell v. Kimmell.

Woodward, J.— We readily concur in the opinion, that the finding should have been in favor of the defendant. It is true, that in some important points, the testimony fails to describe the note, as in relation to the interest and the prompt payment; but, on the other hand, in several material matters, it is strictly correct, or very nearly so. Thus, it comes within the days of the date, and within six cents of the amount; and the witness did not name his date or sum with a profession of certainty. Then, he was correct in the time when it became due, and the most important item was, that he owed the plaintiff no other note. This determines the question, for on this he would be informed. If he is to be believed, this settles it, and his veracity is not questioned.

This court may review the finding of the court below, in like manner as they may re-examine the verdict of a jury, but the entire evidence must be brought up. In this case, it is so. This takes the place of a motion to set aside the verdict of a jury, for the reason that it is not supported by the evidence.

The plaintiff further objects that there is no motion for a new trial, nor bill of exceptions. It is true that there is no such motion. But it is difficult to avoid regarding the paper signed by the judge, as answering the purpose of a bill of exceptions. It contains the submission of the cause to the court, the entire evidence, and the finding of the court; and to this the defendants except, the exception is allowed, and it is signed by the judge. Although not in the form usually assumed by a bill of exceptions, we find it difficult not to give it the effect of one. The defendants are, therefore, fairly in this court; and though unwilling to set aside a finding, where it can justly be supported, we concur, without hesitation, in thinking it erroneous.

The judgment will, therefore, be reversed, and the cause is remanded for the court to take the proper course for enforcing the law relating to usury.

8 284 41 752

Snell v. Eckerson.

Snell v. Eckerson.

Where in a suit commenced by attachment, the petition was addressed to the district court of the proper county, and the affidavit for the writ attached to the petition was signed by the affiant, and certified as follows: "Subscribed and sworn to before me, this 26th day of February, 1858, H. B. M., J. P.;" and where it was urged that it did not appear where the affidavit was made; Held, 1. That the presumption was, that the justice administered the oath within the proper county; 2. That the failure to set out more definitely the county and state where the oath was administered, was an omission which could not materially prejudice the appellant.

A party cannot be made liable for money paid to his use, unless his request to pay the money, is proved by other evidence than that furnished by the books of the plaintiff.

Where in an action to recover for goods, wares and merchandise, sold to defendant, and for money paid for him to the firm of H. & Co., the plaintiff offered in evidence his book of original entries, to show the payment to H. & Co., which book contained an item as follows, "May 17, 1857. To amount paid H. & Co. \$45 35;" and then offered the books of H. & Co., without any proof of authority by defendant to plaintiff to pay the same; and where the defendant objected to the admission of the books of H. & Co., without first showing some authority to plaintiff to pay the same, or an assignment of the account, in some other manner than the charge on the plaintiff's books, which objection was overruled, and the evidence admitted; Held, That the court erred in admitting the evidence.

Appeal from the Hamilton District Court.

TUESDAY, APRIL 12.

Plaintiffs brought their action to recover for goods, wares and merchandise sold to defendant, and for an amount paid for him to the firm of Hancock & Co., as shown by bill of particulars annexed. The bill of particulars contains a number of items, the last one being "May 17, 1857. To amount paid Hancock & Co., \$45,35." The defendant answered, denying all the matter contained in the petition; denying any indebtedness to Hancock & Co., and any payment to them by plaintiffs, or if made, that it was without his knowledge, authority or request. An attachment was

Snell v. Eckerson.

issued, and motion made to dissolve the same, which was overruled. The questions made in this court, relate to the motion to dissolve, and the introduction of certain books of account, to prove the item of \$45 35. Judgment for plaintiffs, and defendant appeals.

Hull & Dennison, for the appellant.

J. A. Kasson and D. O. Finch, for the appellee.

WRIGHT, C. J.—The objection made to the affidavit for the attachment, so far as urged in argument, is, that it does not appear that the justice before whom the petition was sworn to, was an officer within this state, nor does it appear where the affidavit was made. The first part of this objection was not made in the court below, and is, therefore, not considered here.

The affidavit attached to the petition, is signed, and then follows these words: "Subscribed and sworn to before me, this 26th day of February, 1858. H. B. Martin, J. P." The petition is entitled, and directed to the district court of Hamilton county, Iowa, and all the proceedings run in the name of said state. The presumption is, that the justice administered the oath within the proper county. Code, section 2512. The failure to set out more definitely, the county and state where the oath was administered, was an omission which could not, under the circumstances, be so material as to prejudice the appellant, and was therefore properly disregarded. Section 1758.

The bill of exceptions recites, that plaintiffs "offered in evidence his book of original entries, to show the payment of the account to Hancock & Co., for the defendant, and then offered the books of Hancock & Co., without any proof of authority by defendant to plaintiffs, to pay the same, except the charge of money paid on the books of plaintiffs, and defendant objected to the admission of the books of H. & Co., without first showing some authority to

Garvin v. Wells.

plaintiffs to pay said indebtedness, or an assignment of the account, in some other manner than the charge on the plaintiffs' books." The objection was overruled, and the evidence admitted.

Defendant could not be made liable in this action, for the item of \$45 35, unless his request to plaintiffs to pay the same, was proved by other evidence than that furnished by the books. 2 Smith's Lead. Cases, 349, 372; 1 Greenl. Ev., section 118, note 1; Hagge v. Veiths, ante 163; Young v. Jones, ante 219; Sloan v. Ault, ante 229. In receiving such evidence, therefore, the court erred, and the judgment is reversed.

8 286 109 96 109 671

GARVIN V. WELLS.

The supreme court cannot take judicial notice of the provisions of a city ordinance.

In the appellate court, the presumption is in favor of the correctness of the decision of the district court. If there was error in the ruling made, the party complaining should show it.

Where the judgment of a justice of the peace is reversed upon writ of error, the cause should be remanded to the justice, or a trial de novo awarded in the district court.

Appeal from the Des Moines District Court.

TUESDAY, APRIL 12.

The plaintiff sued before a justice of the peace, claiming fifty dollars for the value of a dog, killed by defendant. The answer admits the killing (says, however, that the animal killed was a bitch); that at the time he was the regularly authorized and acting marshal of the city of Burlington, and that there was an ordinance in force in said city in relation to dogs. (This ordinance is referred to as being

Garvin v. Wells.

found on page 56 of the revised ordinances of said city, and in no other manner.) The answer also states, that before the killing, defendant had conformed to all the requirements of said ordinance; that the animal was subject to the tax specified in the ordinance; and that he had demanded this tax, and payment of the same had been refused by defendant. To this answer there was a demurrer, for the following reasons:

First. Because the city had no power to authorize such killing.

Second. That the ordinance does not provide that the owner, whose dog is killed, shall not be indemnified.

Third. That said ordinance is unconstitutional and void. This demurrer was sustained by the justice, and the cause taken to the district court upon writ of error. That court reversed the decision of the justice, and rendered judgment against plaintiff, for the costs in both courts, and directed that defendant go hence without day. Plaintiff appeals.

C. Ben Darwin, for the appellant.

Starr & Phelps, for the appellee.

WRIGHT, C. J.—The errors assigned are: 1. For reversing the judgment of the justice, &c.; 2. In rendering final judgment and dismissing the cause, instead of remanding the same to the justice.

However weighty or important the questions raised by the appellant by his demurrer, may be, as abstract propositions, we do not conceive it necessary to examine them, as the record stands in this case. It will be observed that there is no objection made to the form of the answer, nor to the fact that the ordinance relied upon, is not properly made a part of the pleading. The points made by the demurrer, relate to the power of the city to pass the ordinance, and its effect upon the right of the plaintiff to recover, granting the pow-

This court cannot take judicial notice of the er to enact it. provisions of the ordinance, nor is there anything in the record to inform us what it is. We cannot, therefore, determine whether it is such an one as the city had the power to pass, nor its effects upon the plaintiff's right to recover, if defendant acted under it as marshal, in killing the dog. Had the objection been made, that the answer should have set forth the ordinance, and thus contained that upon which the defendant relied for his justification, a different question would have been presented. The presumption is, that the district court decided correctly, and that it either did not have this ordinance before it, and hence was unable to determine whether it was obnoxious to the objections made, or that being properly brought to its attention, it was found not liable to the objections. If there was error in the ruling made, the party complaining should show it. There is nothing in the record to repel the presumption of the correctness of the decision. Conboy v. Iowa City, 2 Iowa, 90.

The court erred in dismissing plaintiff's action, upon overruling the demurrer to the answer. The cause should have been remanded to the justice, or a trial de novo awarded in the district court. The judgment should have been substantially respondent ouster. For this error, the judgment is reversed.

THE STATE OF IOWA v. CALLENDINE.

Where a party is put upon trial for a criminal offense, it is not within the scope of the authority of either the attorney for the state, or of the court, to take the case from the jury, of their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be newly presented; and such a proceeding amounts to an acquittal, and may be pleaded as such.

A party accused with crime, has rights which the law recognizes and protects, and the constitutional command that a person shall not be twice



put upon trial for the same offense, cannot be trifled with, and is not subject to the arbitrary will of either the public prosecutor or the court.

To permit either the court, or the attorney for the state, to stop a criminal trial, and bind over or commit the accused, to answer to the same or another indictment, at a future time, because the testimony fails, or a witness is wanting, in consequence of his name not being upon the indictment, would be trifling with the accused to a degree which cannot be tolerated.

The provisions of chapter 176 of the Code, do not extend the powers of the court so far as to permit the court to arrest a criminal trial, and discharge the jury, because of the exclusion of a witness, and to hold the defendant to answer to a subsequent indictment for the same offense.

Where to an indictment for having in his possession forged and counterfeit bank bills, with intent to defraud, knowing them to be counterfeit, the defendant filed a special plea, averring that at a former term of the court, he was legally and regularly indicted for the same offense; that he pleaded to the indictment, and issue was joined thereon; that a jury was regularly impanneled and sworn, and the trial progressed to the examination of one K. and one M., as witnesses on the part of the state, when, on motion of the court, the indictment was dismissed, and the defendant discharged from the same; and that said proceedings were a bar to further proceedings against him on the present indictment, to which plea's demurrer was sustained by the court; Held, That the court erred in sustaining the demurrer.

In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., it is not necessary to allege an intent to defraud any particular person or corporation; nor is it necessary to aver a felonious or wilful intent to defraud.

In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., a copy of the bills should be set out in the indictment, or a reason given for not doing so.

Section 2630 of the Code, means a bill purporting to be issued by a company or bank named, which company or bank is, in fact, authorized, &c., and not a bill purporting that the company or bank is authorized, &c.

Where an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., described the bills as follows: "Thirteen false, &c., bank bills, numbered 1566, 1559, 1570, &c., purporting to have been issued by a corporation duly authorized for that purpose by the state of Illinois, to-wit: purporting to be bank bills of the bank of Belleville, state of Illinois, each of said bank bills being of the denomination of two dollars;" Held, That the bills were not sufficiently described.

Neither the present nor the past statutes of this state, dispense with the leading requisites of indictments.

Vol. VIII.-37

Appeal from the Des Moines District Court.

WEDNESDAY, APRIL 13.

At the April term of the district court, 1858, the defendant was indicted for having in his possession thirteen forged and counterfeit bank bills, with intent to defraud, knowing them to be so counterfeited. The defendant filed a motion for a change of venue, a motion to quash, and a demurrer, which were successively overruled; and he then filed a plea of not guilty, and a special plea. To the special plea a demurrer was filed, and sustained by the court. The defendant was convicted, and sentenced to the penitentiary for five years, from which judgment he appeals. The other material facts are stated in the opinion of the court.

Browning & Tracy, for the appellant, referred to Harker v. The State, 8 Blackf., 540; Mount v. The State, 14 Ohio, 292; Whart. Crim. Law, 513, 544; 2 Bishop's Crim. Law, 659, 675, and note 4; Wright v. The State, 5 Ind., 597; Commonwealth v. Cook, 6 Searg. & R., 577; United States v. Shoemaker, 2 McLean, 114.

C. Ben Darwin, for the state, cited The United States v. Coolidge, 2 Gallison, C. C., 366.

Woodward, J.—As the last plea determines the case, if found true, and presents an interesting and important question, we turn our first attention to it.

This plea avers, that at the November term, 1856, of the same court, he was legally and regularly indicted for the same offense; that he pleaded to the indictment, and issue was joined thereon; that a jury was regularly impanneled and sworn, and the trial progressed to the examination of one Healy and one McDonald, as witnesses on the part of the state, when, on motion of the court, the indictment was dismissed, and the defendant was discharged from the same. He makes profert of a copy of the record, and concludes by

averring that those proceedings are a bar to further proceedings against him on the present indictment.

That which purports to be the record entry recites, that the state proceeded in offering testimony, when it appearing that one M'Donald was the only witness on the part of the state upon whom it relied, and that his name was not indorsed upon the indictment, he not having appeared before the grand jury, and that he was objected to as a witness for that reason; thereupon, by order of the court, the indictment was dismissed, and the prisoner discharged therefrom, but was afterwards held to bail for the further action of the grand jury, which was then in session. The prosecutor demurred to this plea, and the demurrer was sustained.

We shall proceed to show that the court erred in sustaining the demurrer; for the defendant being put upon trial under charge of a public offense, it is not within the scope of the authority, of either the prosecuting attorney, or of the court, to take the case from the jury of their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be newly presented. Such a proceeding amounts to an acquittal, and may be pleaded as a bar.

The case of *The State* v. Wright, 5 Ind., 290, was the following: The defendant was arraigned and put on trial on a Saturday, which was the last day of the term in that county, and the court sat in another county on the next Monday. At twelve o'clock at night, the trial had not come to a close, and the court believing that they could set no longer in that county, dismissed the jury, and held the defendant to bail for appearance at the next term. The supreme court held, that under the circumstances, the court could have continued to sit until the conclusion of the trial, and that there was no necessity for dismissing the jury and withdrawing the case; and held that the defendant was entitled to a verdict, and that the proceeding was equivalent to an acquittal.

The case of The United States v. Shoemaker, 2 McLean,

114, points out the true line of distinction in regard to discontinuing a criminal action. It is to be remembered that an accused has rights which the law recognizes and protects, and that the constitutional command that a person shall not be twice put upon trial, cannot be trifled with, and is not subject to the arbitrary will of either the public attorney or the court.

In the case in McLean, the defendant was indicted for taking letters from the mail. The jury was impanneled, and witnesses were sworn, when the prosecuting attorney abandoned the prosecution and entered a nolle prosequi.

In the consideration of the question by the learned judge, he considers that if this power exists in the prosecutor, it is subject to no limit, and might be made the means of great vexation to persons charged with crime; and that it might even be used experimentally to draw out the testimony, and see if it were sufficient, or might be made stronger. He says the attorney may enter a *nol. pros.* before the trial is entered upon, and it will be no bar, but that after plea, and jury sworn, or after the evidence is in, he cannot do it.

Neither is it altogether, and at all times, within the discretion of the court to stop the prosecution, and still hold the accused to answer to the same offense on a future charge. It may discharge the jury under peculiar circumstances, in cases of necessity, as upon a sudden indisposition of a witness, a juror, or the court, or a final difference of opinion among the jurors; for, over circumstances of this nature, neither the court, the attorney, nor the parties, have any But, to warrant this course, there should be some emergency—some circumstance over which neither the court nor attorney has control. To permit either to thus stop the trial, and bind over or commit the accused to answer to the same, or another indictment, at a future term, because the testimony fails, or a witness is wanting in consequence of his name not being upon the indictment, would be trifling with the accused to a degree which cannot be tolerated.

But still further: This case is like that first cited from

Indiana, in the circumstance that the supposed necessity did not exist. In that, it was competent for the court to continue the trial to its close. In this, the court supposed that the witness could not be sworn, because he had not been before the grand jury, and therefore his name was not upon the indictment. But this necessity did not exist. The supreme court of the state had decided that, though this may have been true under the former law, it was not so under the Code, and that such a witness might be examined. Even the species of necessity supposed did not exist therefor, but the discharge arose merely from the will of the court.

It is not considered of any importance in the consideration of the question, that the defendant moved the exclusion of the witness. Even supposing the ruling of the court to be correct, and that the witness could not be examined, the motion of the defendant was but the exercise of an ordinary legal right pertaining to every person accused, and the effect was but the familiar one of the opposite party being left, by the rejection of his witness, without testimony sufficient to support his indictment. The legal right to object to a witness, cannot be exercised under so heavy a penalty as to be held, by the success of the motion, to a new charge and a new trial. And if the result of such an attempt happens to be the disarining of the prosecution, it is but one of those chances for life, to which an accused is entitled. If there be a fault, it is not on his side, but on that of the prosecution.

In the case of *Commonwealth* v. Wade, 17 Pick., 395, the court say, there was no necessity—no unforeseen cause of delay—no accident—no mistake—no extraordinary exigence; but it was an ordinary case of a good indictment, but a failure in the proof.

In 1 Chit. Cr. Law, 631, it is said that it would be absurd to suppose, that after the evidence is given, the prosecutor might be allowed to withdraw a juror, merely because the proof would not amount to conviction; or to allow a nol.

pros. because the proof was not sufficient to convict. And why would it not be equally absurd to hold that the judge was authorized to discharge the jury, because the attorney had omitted to call a witness before the grand jury, and to indorse his name—even supposing that necessary—and still more when it is not so. The case is not relieved by the fact that the judge, and not the attorney, did it. It is the occasion, or the cause upon which it is done, that has weight, and not the officer by whom it is done.

In The Commonwialth v. Cook, 6 S. & R., 577, the court held that a discharge of the jury once sworn, in a criminal case, was an acquittal of the defendant.

In the *U. S.* v. *Perez*, 9 Wend., 579, (6 Curtis, 194), the court hold this general language: The law has invested courts of justice with the authority to discharge a jury whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would be defeated. This language would seem to leave it discretionary, but the case before them was only one where the jury could not agree; and the court say, further: "To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious reasons."

The preceding cases may be regarded as giving definiteness to the general terms of the last one, and as exponents of the "urgent circumstances," which will warrant the exercise of the power.

The provisions of the Code, contained in chapter 176, do not extend the power so far as the present case. Some of the instances there named, are such as were previously recognised by the law; and one or two of them are such as must stand, if at all, by virtue of the statute alone; but all of them are of the nature of unforeseen emergencies. The case before us is one of want of forethought—want of provision; and differs in nothing from one in which the prosecutor has not summoned a certain witness, or in which a wit-

ness is objected to as incompetent, and the state left without testimony.

Considering, then, the rights of one accused—that he is entitled to a trial and verdict—and that he cannot be subject to have his trial cut short, on account of a want of preparation, or of proof, on the part of the state, and still be held to a future trial, or to answer a future indictment, at the convenience, or the arbitrary will, of another, we are of the opinion, that the proceedings operate as an acquittal of the defendant.

As to the objection that the plea does not set up a former conviction or acquittal, we need only reply, that in the nature of the case, the defendant cannot plead an acquittal in form and technically, but the facts are considered as amounting to that, in the cases which hold them to constitute a discharge. This court is, therefore, of opinion that the district court erred in sustaining the demurrer to this plea, and in rejecting the evidence offered to support it.

Some questions made by the demurrer of the defendant to the indictment, and by his motion to quash, call for a portion of attention.

The first cause of demurrer is, that the indictment does not allege an intent to defraud any person or corporation. The demurrer overlooked section 2927 of the Code, which provides that a general allegation of an intent to defraud, shall be sufficient.

The third cause of demurrer is, that the indictment does not aver a felonious or willful intent to defraud. This is a case where the words of the statute, without the addition of others, are sufficient. That requires only "an intent to defraud," and does not require that these should be qualified by the terms "willful," or "felonious."

The fourth cause of demurrer is, that the indictment does not set forth, nor sufficiently describe, the bills, nor give any reason for not so doing. They are described as "thirteen false, &c., bank bills, numbered 1566, 1559, 1570, &c., purporting to have been issued by a corporation, duly au-

thorized for that purpose by the state of Illinois, to-wit: purporting to be bank bills of the bank of Belleville, state of Illinois, each of said bank bills of the denomination of two dollars."

As to that portion of the indictment which is descriptive, it is not certain that a court can, from the face of it, alone, without a bill being annexed, determine whether they are properly described. Calling them bank bills—on such a bank—of such a denomination—is so far descriptive; but it is more than doubtful if the numbers are so, without the letter. In every issue of bank bills, there are two or more bills of the same number, and it is the letter only which distinguishes or identifies them. The rest of the description relates to the purport of them. The statute definition is, a bank bill, issued, or purporting to be issued, by a corporation or company, duly authorized for that purpose by any state, &c.

The "purport" is that which appears on the face of an instrument. 1 Whart. Cr. Law, sec. 307; 2 Whart. Cr. Law, No. 264; 3 Arch. Cr. Pl. & Pr., 536-27. Wharton says, that, under this term, should be given no other description than its nature, as a bond, a bank bill, &c. But it is usually intended to express the substance and effect, as appears from the face, in distinction from "tenor," which means a copy, or exactness. Then, a bill may purport to be one of a certain bank, but how can it purport that the bank, or corporation, is one authorized by the laws of a state. We will not say that no bank bill did ever purport this—that is, that the company is duly authorized by law; but no such an one has ever fallen under our observa-The statute means a bill purporting to be issued by a company (or bank) named, which company is, in fact, authorized, &c., and then provides, by another section, that its existence may be proved by reputation, without producing the charter.

Now, upon the face only of an indictment, a court can-

not say whether the bills are described, or whether they purport that which the law requires, in the definition of the offense. To do this, the bill must be set out. And perhaps this is one reason which gives force to the other objection contained in this cause of demurrer.

The other objection is, that the bills are not set out, nor is there any reason given for the omission. The books agree in holding, that the instrument, in the class of cases connected with forgery, must be set out, or a reason given for not doing it. The reason commonly given is, that the court may see that it is one which comes within the statute. But this may not be the only one. 1 Whart. Cr. Law, sec. 306; 2 Ib., No. 264; 3 Arch. Cr. L., Pl. & Pr., 536.

Neither our present, nor the past, statutes of this state, have ever been held to dispense with the leading requisites of indictments. The Code, in section 2916, declares that an indictment shall not be quashed, if (among other requisites), it set forth the charge so clearly that the accused can plead the judgment in bar, and if, (when material), the name of the injured party be set forth, or stated not to be known to the grand jury. These, and similar provisions, have never been so construed as to obviate the necessity of the hitherto prominent features of a criminal charge.

This indictment appears to us to be a very naked one. It gives neither the tenor nor the purport of the bills; it does not set them out in any manner or degree—nor does it give the letters. When this cannot be done, as when the prosecutor has not possession of the instrument, a statement of the fact excuses, but when he can do it, as appears in the present case, it is necessary to do it, that the court may judge of it, and that the accused may have the benefit of it.

For these reasons, we are of opinion that the demurrer to the indictment should have been sustained. Wherefore, it is considered that there is error in the rendition of the judgment aforesaid, and the same is reversed.

Vol. VIII.-38

HIGGINS v. REED et al.

In an action of trespass, the defendants justified as president and secretary of a school district, and claimed that in October, 1855, a school-house tax was assessed in said district upon the property therein, including that of plaintiff, and that for the purpose of collecting said tax, they levied upon and sold the property. For the purpose of proving the assessment, the defendants offered to prove, by competent witnesses, the loss of certain records belonging to said district, in 1856, and then to prove the contents of said records. The witnesses, in speaking of the records, described them as being kept on half sheets and quarto sheets of paper, not bound in book form. To all this testimony the plaintiff objected, for the reason that the evidence did not show such a record as a school district was required to keep, and that the existence and contents of a public record could not be proved by parol; Held, That the evidence was admissible.

After proof of the loss of a record, its contents may be proved, like any other documents, by secondary evidence.

Where the original record is lost, and a copy can be produced, the copy is better than parol evidence of its contents, and its production should be required; but if the existence of better evidence is not disclosed, then the contents may be proved by parol.

Section 1126 of the Code is but directory; and the failure of the secretary of a board of directors of a school district, to record all the proceedings of the board, and of the district meetings, in separate books, to be kept for that purpose, or a record of them upon loose sheets of paper, instead of a bound book, will not render the proceedings of the board or district void, nor make persons subsequently in office liable for the failure of their predecessors to comply with a directory provision of the statute.

Where in an action of trespass, in which the defendants justified as school officers, and after they had established the contents of a lost record of the school district, showing that a school-house tax had been levied in the district in 1855, the defendants offered in evidence a paper in the hand-writing of the secretary of the district, (but whether in that of one of the defendants, did not appear,) showing the amount of tax due from the several citizens of the district, containing the names of the plaintiffs and others, with memorandums as to who had paid, which paper, the bill of exceptions states, was the only written evidence remaining of the tax list of 1855, to which evidence the plaintiff objected; Held, That if the paper offered in evidence, was a copy of the assessment-roll provided for in section 1130 of the Code, or one of the list posted up, as provided for in that section, it was properly admitted in evidence.

Where there is a failure to collect a school-house tax during the year in which it is levied, the power and authority conferred by the warrant does not expire with the year, where the tax is levied upon personal property, and not upon real estate; and if the warrant thus issued shall be lost, it may be supplied by a new one, and the right and power of the secretary of the district to collect the taxes, is none the less clear or effective, than if the old warrant was still in existence and produced; nor is such warrant authority to the person in office, at the time of its issue, alone, but it protects equally his successor.

And in such a case, though no second warrant should issue, if the officer can show that one was issued, and establish its loss, he may protect himself by proving its contents.

Where in an action of trespass, in which the defendants justified the taking and sale of the property, as school officers, in payment of a schoolhouse tax, it appeared that the tax was voted by the district in October, 1855, and duly advertised; that the records were lost in 1856; and that in June, 1857, the president of the district, one of the defendants, issued his warrant to the secretary, the other defendant, authorizing and commanding him to collect the taxes so levied and advertised, and also a list advertised in December, 1856, under which warrant the property was sold; and where the defendants offered the said warrants in evidence, to which the plaintiff objected, for the reason that it purports to be issued in June, 1857, directing the collection of taxes levied in 1855, the record of the levy having been lost before the issuing of the said warrant; Held, That the evidence was admissible.

In an action of trespass against the officers of a school district, for the taking and sale of personal property, in payment of a school-house tax, the defendants may offer in evidence, a bond for the delivery of the property executed by the plaintiff.

Appeal from the Keokuk District Court.

WEDNESDAY, APRIL 13.

PLAINTIFF sues in trespass, for the value of a horse. Defendants admit the taking by one of them, and justify as school officers, for that the said horse was levied upon and sold, to satisfy a school-house tax assessed against said plaintiff. Replication denying the authority or power of defendants to make the seizure. There was a trial by the court; judgment for defendants, and plaintiff appeals. The other material facts are stated in the opinion of the court.

G. Wilkinson and J. M. Casey, for the appellant.

No appearance for the appellees.

WRIGHT, C. J.—The questions made in this case, relate alone to the admission of certain testimony.

Reed was the president, and Griffen was the secretary, of school district number four, Washington township, Keokuk county, and were elected and qualified in 1857. They claim that in October, 1855, a school-house tax was assessed in said district, upon the property therein, including that of plaintiff; and that for the purpose of collecting said tax, they levied upon and sold his horse, and that this is the trespass of which he complains.

For the purpose of proving said assessment, defendants proposed to prove by competent witnesses, the loss of certain records belonging to said district, in 1856. Such loss being fully established, defendants then proposed to prove the contents of said records. The witnesses, in speaking of said records, described them as being kept on half sheets and quarter sheets of paper, not bound in book form. To all this testimony, plaintiff objected, for the reason that this was not such a record as a school district was bound to keep, and that the existence and contents of a public record, could not be proved by parol.

The question would not seem to admit of a reasonable doubt. The existence and contents of an ancient record, when lost, may, under some circumstances, be presumed. Whether ancient or recent, after proof of the loss, its contents may be proved like any other document, by secondary evidence. Where the original is lost, and a copy can be produced, of course this would be better than parol evidence of the contents, and its production should be required. If the existence of other and better evidence is not disclosed, then the contents may be proved by parol. 1 Greenleaf's Ev., sec. 84, note 2, 509. In Stockbridge v.

Stockbridge, 12 Mass., 400, it was held that the incorporation of a town, might be proved by parol. Records generally, it is said, are to be proved by inspection, or by copies properly authenticated, but if there be sufficient proof of the loss or destruction of a record, much inferior evidence of its contents may be admitted, and it cannot be doubted that parol evidence is competent to prove the existence and loss of a record. 1 Starkie's Ev., 355.

The contents of the lost record being established, and it being thus shown that a tax had been levied in October. 1855, defendants offered a paper which was in the handwriting of the secretary of the district, (but whether of one of these defendants, does not appear), showing the amount due from the several citizens of said district, with memorandums as to who had paid. This paper contains the name of the plaintiff, with others, and the amount of tax opposite his name, as stated in the answer, which appears to be unpaid. The bill of exceptions states that this was the only written evidence remaining of the tax list of 1855. Plaintiff objected to the introduction of this paper, but upon what ground, is not stated. The objection was overruled, and he excepted. This list is spoken of in the assignment of errors and agreement, as that advertised by the secretary, and we suppose it to be the one required by section 1130 of the Code. This section makes it the duty of the secretary, to obtain a transcript of the last assessment roll of the county, adding thereto any taxable property therein omitted, and to post up a list of the persons taxed, at three or more places in the district, with the amount due from each, set opposite their respective names. If the writing offered was this transcript, or one of the list so posted up, there can be no reasonable doubt as to its admissibility. If the defendants could prove any portion of the record relied on, by the record itself, or by copies, they would certainly have a right, and it would be their duty, to

do so. A part might be proved by parol, and a part by higher, or primary, evidence.

And before leaving this point in the case, we will notice an objection made by the plaintiff, and which, appropriately, should have been considered, when disposing of the first point in the case. We allude to the manner of keeping the records by the school officers—it being shown that they were kept upon separate pieces of paper, some half, and some quarter sheets. The law makes it the duty of the secretary of the district, to record all the proceedings of the board, and of the district meetings, in separate books to be kept for that purpose. Now, it certainly would tend much to the safety and judicious disposition of the school business of each district, if this provision was strictly and technically followed-each secretary furnishing himself with good, substantial blank books, in which to record the proceedings. And we may be permitted to say, that in a matter of so much importance, and one affecting so many interests, there is entirely too much carelessness in the manner of keeping the records and proceedings. And yet, we are not prepared to say that this requirement, is so far mandatory, as that all the proceedings of a board, or district, would be void, because they were recorded on loose sheets of paper, instead of a bound book. We regard it as directory—a direction, however, that prudence would dictate always to follow. To hold such proceedings void, would make officers subsequently in office, liable for the failure of their predecessors, to comply with a directory provision of the statute, while the fact of the levy of the tax, or the compliance with the law in every other respect, might be most incontrovertibly established.

The next point in the case arises upon these facts: The tax was levied, or voted, in October, 1855, and the records lost in 1856. In June, 1857, the president of the district, one of the present defendants, issued his warrant to the secretary, the other defendant, authorizing and commanding ing him to collect the taxes so levied and advertised, and

also a list advertised in December, 1856. This was the warrant under which the horse was sold. To the introduction of it the plaintiff objected, for the reason that it purports to be issued in June, 1857, directing the collection of taxes levied in 1855—the record of the levy having been lost before the issuing of said warrant.

If the tax was in fact voted at a regular meeting in October, as claimed, in accordance with section 1115; and if the record thereof was made, as required; and it further appeared, that the transcript had been obtained, and the list posted as directed in section 1130, then it was the duty of the president to issue his warrant to the secretary. ence to sections 1130-1-2, it will be seen that the list is to be posted by the secretary at least thirty days previous to his proceeding to collect the tax; that during this thirty days, persons may apply for relief, if taxed beyond their due proportion; and that after this, the president issues his The provisions contemplate, beyond all questior, that the warrant shall issue immediately, or soon after, the expiration of the thirty days, and that the secretary shall proceed at once to the collection of the taxes. whole spirit and policy of the law, indicates that the collection is to be made, if possible, during the year, and a report made to the county treasurer of the delinquent lands in time for sale, in the same manner that he sells other lands for delinguent county taxes for that year. (Sections 1133-4.) If, however, there shall be a failure to collect during the year, we are not aware that the power and authority conferred by the warrant, expires or ceases. And certainly it does not, where the tax levied is upon personal property, and not upon real estate. If the warrant thus issued, shall be lost, it may be supplied by a new one, and the right and power of the secretary is none the less clear and effective, than if the old one was still in existence and produced. Nor is the authority to the person in office, at the time of its issue, alone: but it protects, equally, his successor. And though

no second warrant should issue, yet if the officer can show that one was issued, and establish its loss, he may protect himself by proving its contents. And thus we see, that the secretary in this case, as the successor to the officer to whom the original warrant was issued, might have relied upon that for his protection, without reference to the one issued in 1857. But if, instead of doing this, he produces one issued to supply that lost, we can see no objection to it.

When the secretary levied on the horse, the plaintiff gave a bond with sureties, conditioned for his delivery on the day fixed for sale. On the trial, this bond was offered in evidence, objected to by plaintiff, and the objection overruled. What possible objection there could be to its introduction, we cannot conceive. None have been pointed out.

Judgment affirmed.



SEYMOUR & Co. v. BUTLER.

A release is to be construed according to the particular purpose for which it was made, and a particular recital in such an instrument will restrain its general words.

No such effect can be given to the statutes of another state, as that they shall have an extra-territorial operation in furnishing an absolute rule of law for determining, not the validity or construction of a contract sued on, but whether a release made in that state to one partner, shall, or shall not, operate in the state of Iowa, to release and discharge the other

Where in an action against the defendant, as "one of the late firm of B. & H.," on three promissory notes in the firm name, made in New York, and payable to the plaintiffs at Galena, the defendant pleaded that after the making of the notes, the plaintiffs executed a release as follows: "We, J. F. S. & Co., of the city, county and state of New York, for the consideration of \$300 00, received of J. W. H., (the other partner), of Falls Village, Connecticut, do hereby discharge and release said H. from all notes, debts, dues, accounts and demands due to said company and firm of J. F. S. & Co., and do hereby forever release said H. as partner, or joint and several debtor with W. B. (the defendant), to said firm of J. F. S. & Co.. The said H. is hereby individually released from all

claims and demands, and also released and discharged as partner, or joint debtor with said B., meaning hereby only to release and discharge the said H. aforesaid," and averred that the plaintiffs thereby fully released and discharged the said notes, and all moneys unpaid thereon, and thereby fully released the same, so that there remains no claim thereon against the defendant; and where the plaintiffs replied, denying that the said contract made with H. is a release or discharge of defendant, or that the same was intended or understood so to be, and alleging that the same was intended to operate as a release of H. only, and not in any way to affect the claim upon the defendant; that the same was made in the state of New York, and not in the state of Iowa; and that it was made in accordance with an express provision of the revised statutes of the state of New York, authorizing a creditor of a partnership firm dissolved, to release or discharge one or more of the partners from all indebtedness, without such release or discharge having the effect to impair the right of the creditor to proceed at law or equity against the other partners not discharged; to which replication there was a demurrer, which was sustained by the court; Held, 1. That the release discharged H. from the notes sued on, but did not release B.; 2. That the demurrer was properly sustained as to so much of the replication as averred that by virtue of the laws of the state of New York, the release only had the effect of discharging H., and not of discharging B., from the indebtedness.

Appeal from the Dubuque District Court.

WEDNESDAY, APRIL 13.

This suit is brought against William Butler, as "one of the late firm of Butler & Hurlburt," on three promissory notes, made in New York, signed "Butler & Hurlburt," and payable to plaintiffs, in Galena.

The defendant pleaded, that after the making of the notes, the plaintiffs made and executed a release as follows: "We, John F. Seymour & Co., of the city, county, and state of New York, for the consideration of three hundred dollars, received of Joseph W. Hurlburt, of Falls Village, Connecticut, do hereby discharge and release said Hurlburt from all notes, debts, dues, accounts, and demands, due to said company and firm of John F. Seymour & Co., and do hereby forever release said Hurlburt as partner, or joint and Vol. VIII—39

several debtor with William Butler to said firm of John F. Seymour & Co. The said Hurlburt is hereby individually released from all claims and demands, and also released and discharged as partner, or joint debtor, with said Butler; meaning hereby only to release and discharge the said Hurlburt aforesaid." And thereby fully released and discharged said notes, and all moneys unpaid thereon; and thereby fully released the same, so that there remains no claim thereon against the defendant.

The plaintiffs, for replication to this plea, deny that the supposed contract, made by them with Hurlburt, is a release or discharge of defendant, or that the same was intended or understood so to be; and they allege that the same was intended to operate as a release of Hurlburt, only, and not in any way to affect the claim of the plaintiffs upon the de-They further allege that the same was made in the state of New York, and not in the state of Iowa; and that it was made in accordance with an express provision of the Revised Statutes of the state of New York, authorizing a creditor of a partnership firm dissolved, to release and discharge one or more of the partners from all indebtedness. without such release or discharge having the effect to impair the right of the creditor to proceed at law, or in equity, against the other partners not discharged. 2 Rev. Stat., N. Y., 176, Art. 2, secs. 25, 26, 27.

A demurrer to this replication was sustained by the court, and the plaintiff refusing to reply further, judgment was given for the defendant.

Henry S. Jennings, for the appellant. [No brief of counsel for the appellant was found upon the files].

W. T. Barker, for the appellee, cited Benjamin v. M'Connel, 4 Gilm., 536; Scott v. Bennett, 3 Ib., 243; Stacey v. Baker, 1 Scam., 417; Sherman v. Gossett, 4 Gilm., 521; 2 Kent Com., (8 ed.) 584, and notes; Story on Conf. of Laws, sec. 4; 2 Pars. on Cont., 94; Hyde v. Goodnow, 3 Comst.,

266; Com. of Kentucky v. Bassford, 6 Hill, 526; Thompson v. Keehum, 4 Johns., 285, and note; 2 Burr., 1078; 1 Bouv. Inst., 260, and sections 792 to 795.

Stockton, J.—It is well settled that if two or more are jointly, or jointly and severally bound, and the obligee releases to one of them, all are discharged. And a release to one partner, is a release to all. 1 Parsons' Contracts, 23, 162. But (says Mr. Parsons), though the word release be used, even under seal, yet if the parties, the instrument being considered as a whole, and in connection with all the circumstances of the case, and the relations of the parties, cannot reasonably be supposed to have intended a release, it will be construed only as an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release. Ibid, 24, citing Solley v. Forbes, 2 Bro. & Bingham, 46; M'Alister v. Sprague, 34 Maine, 296.

The case of Solley v. Forbes & Ellerman, was a case of a release of all claims and demands to Ellerman, one of the partners, with a provision that nothing therein contained should be taken or construed to release Forbes, or to prejudice any claim or demand the plaintiffs might have upon or against Forbes, either separately, or as partner with Ellerman, in respect to any debt due from the partnership firm to the plaintiffs; and that it might be lawful for the plaintiffs to prosecute any suit, either against the partners jointly, or against Ellerman separately, to compel payment of their debt from the firm, either out of the partnership effects, or from the separate estate of Forbes. In a suit against both partners, Ellerman pleaded the release in bar of the action as to himself, to which the plaintiffs replied that the action was prosecuted against both partners to enforce payment of an indebtedness from the partnership to the plaintiffs, either out of the joint effects of the firm, or out of the separate estate of Forbes. A demurrer to this replication was overruled.

The court held that this was not an absolute and unconditional release, and that no doubt could be entertained that it was not intended by the parties to bar the action; that the words of release were connected with, and followed up by, a proviso, by which it is expressly declared that nothing contained in the deed of release should be taken to release, or in any way prejudice or affect any demands of the plaintiffs against Forbes separately, or as a partner with Ellerman; that it would be to release, and in every way affect the demands against Forbes, as partner with Ellerman, to give such an operation to the release as in effect to make it a release to both, by making it a bar to an action, in which, for the recovery of a joint debt, both must be jointly sued; and that the suit, as brought, was expressly and in direct terms, authorized by the deed of release itself. The principle is distinctly recognized, that a release is to be construed according to the particular purpose for which it was made, and that a particular recital in a deed will restrain the general words.

The release, in this instance, construed by the same rules, must be understood to release Hurlburt from the indebtedness sued on, and not to release Butler. It is not drawn with the same formality and precision as the release set forth in the case cited; but we think the intention of the parties is as clearly to be gathered from it. It cannot reasonably be supposed, from the language used, that the plaintiff intended to release both the partners; and it must be construed as only an agreement not to charge Hurlburt with the debt. Its legal operation will be restrained by the express terms used, by which the plaintiffs stipulate that they only agree to release and discharge one of the joint debtors.

The case of M'Allister v. Sprague & Murphy, was this: The plaintiffs had brought suit against the defendants on an unsettled account; and thereupon they received from Sprague a horse, and gave him a memorandum in the following form: "Received of Jonathan L. Sprague, one red horse, in full for his half of our account against him and E. L. Murphy, * * * to be his discharge in full for debt

Hagan v. Burch.

and costs, but no discharge for Murphy." The court held that the receipt could not fairly be understood to mean, that the whole debt should be discharged by a present release of Sprague. "Its language does not imply an intention to discharge the whole debt, although the consideration might be adequate to that purpose, and also to release Sprague, without its being under seal. Such effect might have been given to it, if it had been so intended. But it must be construed according to the purpose of the parties; and its meaning appears to be, that the whole debt was not to be extinguished, but only one of the debtors discharged."

To so much of the replication as avers, that by virtue of the laws of the state of New York, where the same was made, the release only had the effect of discharging Hurlburt from the indebtedness sued on, and not of discharging Butler, we think the demurrer was properly sustained. No such effect can be given to the statutes of New York, any more than to the adjudications of her courts, as that they shall have an extra territorial operation, in furnishing an absolute rule of law for determining, in this instance, not the validity or construction of the contract sued on, but whether a release, made in that state to one partner, shall, or shall not, operate in the state of Iowa, to release and discharge the other.

Judgment reversed.

HAGAN v. BURCH.

ATTACHMENT. The petition, affidavit for the writ, and attachment bond, were filed on the 29th day of November, 1857, and the writ issued the same day. The original notice was dated the 30th of November, and received by the sheriff on the same day. The defendant moved to quash the writ of attachment, because it was issued before the commencement of the action, which motion was overruled; Held, That the motion was properly overruled.



Hagan v. Burch.

When a petition is filed, an action is so far commenced, that a writ of attachment may issue, before the original notice is placed in the hands of the sheriff for service.

Under the system of pleading provided by the Code, there is no general issue, and a party is required to plead whatever defense he may have.

Where in an action for work and labor, &c., the defendant pleaded, first, a denial of the cause of action, and, secondly, payment; and where on the trial, the defendant offered to prove, "that the money sued for, so far as the plaintiff has any claim, was not due at the commencement of the suit, which being objected to, was rejected by the court, upon the ground that the defendant "offered to prove this fact by a special contract;" Held, That the defendant should have pleaded the contract specially, and that the evidence was properly excluded.

Appeal from the Henry District Court.

WEDNESDAY, APRIL 13.

Action on an open account, for the price of work and labor, and boarding, commenced by attachment. The petition, affidavit for attachment, and attachment bond, were filed on the 29th of November, 1857, and the writ of attachment was issued the same day. The original notice is dated the 30th, and the sheriff's memorandum shows that he received it that day. The defendant moved that the writ of attachment be quashed, because it was issued before the commencement of the action, which motion was overruled.

The defendant answered: First. That he did not owe; and, Secondly. Payment. On the trial, he offered to prove "that the money sued for, so far as the plaintiff has any claim, was not due at the commencement of the suit." This being objected to, was rejected by the court, upon the ground, as the bill of exceptions shows, that defendant "offered to prove this fact by a special contract," and the court held that he could not prove such a special contract, under the issues made by the answer.

David Rorer, for the appellant.

·Palmer & McFarland, for the appellee.

Hagan v. Burch.

WOODWARD, J.—The defendant's motion to quash the attachment was overruled, which is the first error assigned. We do not think the objection substantial. Section 1717 of the Code, directs the sheriff to note on the original notice the time of its receipt, and section 1663 enacts that the delivery of the notice to the sheriff, with the intent that it be served immediately, is a commencement of the action. But it will be noticed that this latter provision, is contained in the chapter (99) which relates to the limitation of actions. The intention here is, that when the precise time of the commencement of an action becomes material, the fact referred to in section 1663, is made to define that time. filing the petition, or the issuing the notice, might have been made the point, but these might take place without an intent to prosecute the action immediately, so that delivering the notice with intent to be served, is made the time to which to reckon, especially in the question of limi-The action may, however, be fairly considered as begun, for other purposes, and, perhaps, to all common intents and purposes, when the petition is filed. least, it seems consistent and reasonable to consider it so far commenced, as that part of its own process—such as a writ of attachment-may issue even before the notice. There is no harm, no wrong, effected by this. there is no possible reason why the attachment should not issue before the notice, save the provision that the attachment may issue at the commencement, or during the progress of a suit. Section 1846. And the force of this, depends upon the construction to be given it. If sections 1663 and 1846, are to receive a rigid construction, so that there is no "commencement" of an action in any sense. nor to any purpose, but in the delivery of the notice, with intent to be served, then the writ of attachment cannot issue before the notice, and in the case at bar, it is irregular. and must be quashed. But such a construction does not appear to us necessary, and the attachment was well enough issued after the petition was filed, and before the noHagan v. Burch.

tice. This course would compel the plaintiff to serve his notice, before the next term of the court; for, if this should not be done, the attachment would then be quashed, of course, and the party suing it out, would render himself liable on his bond, for suing out and levying an attachment without prosecuting an action.

We do not intend to intimate here, that there may be any unnecessary delay, but the several steps should appear to be parts of the same transaction and proceedings.

In the present case, there is another fact which strengthens the position above taken. The attachment was sued out on Sunday, and the affidavit required by statute in such case, is made. Those things which were requisite for obtaining the attachment on that day, were done, and none others, the party probably supposing, that the issuance of process, or notice, would be illegal. This was issued, and put into the officer's hands the next day, which was as soon as was practicable. The case stands upon its own facts, and can scarcely serve as a precedent for one in other circumstances.

The other error assigned, relates to the exclusion of the evidence offered by the defendant. There would probably be little doubt of the admissibility of this evidence under the plea of nil debet, at common law; but under our present system, there is no general issue. The party is to plead what defense he intends. In the present instance, he should have pleaded the contract specially, and the court did not err in the ruling upon it.

The judgment is affirmed.

Fink v Fink.

FINK v. FINK.

Where parties to a suit then pending in court, submit the matters involved therein to arbitrators, by agreement, and without any order of court, the agreement of submission must be acknowledged, as required by section 2100 of the Code.

Where a submission to arbitrators is not acknowledged, when required, the award cannot be received and adopted as one made under a statutory submission; but it may still be good, as at common law, and an action maintained thereon, as upon any other agreement.

Where a cause was pending in the district court, involving the examination of long accounts, and the parties filed in said court a written agreement to submit the cause to arbitration, under which the arbitrators were "to meet and determine said matters on the 17th day of August, 1858, and to adjourn from day to day, until concluded, and within five days thereafter, file the same in the district court of Polk county, or the clerk's office thereof;" but no order of court was made directing the submission, nor did the parties appear before a justice of the peace, or other officer, and acknowledge the submission; and where the arbitrators met on the day named, heard a portion of the testimony, and adjourned to the next day, on which (the 18th of August) they agreed upon their award in favor of the plaintiff, and it was filed with the clerk of the court, on the 23d of August, 1858; and where the plaintiff's motion for judgment on the award was overruled, and the court refused to enter judgment thereon; Held, 1. That the award was filed within the time required by the submission; 2. That the submission should have been acknowledged, to authorize the court to adopt and render judgment upon the award; 3. That there was no error in the action of the court in refusing to render judgment on the award.

Appeal from the Polk District Court.

WEDNESDAY, APRIL 13.

A CAUSE was pending in the district court between these parties, involving the examination of long accounts. They filed a written agreement to submit the cause to arbitration. The arbitrators were to "meet and determine said matters on the first of August, 1858, and to adjourn from day to day until concluded, and within five days thereafter, file the same in the district court of Polk county, or the clerk's office thereof." No order of court was made, directing the

Vol. VIII.-40

Fink v. Fink

submission, nor did the parties appear before a justice or other officer, and acknowledge the instrument so signed and entered into by them. The arbitrators met on the day named, heard a portion of the testimony, and adjourned to the next day. On that day, (the 18th of August), they agreed on their award, in favor of plaintiff, made it up and filed it on the 23d with the clerk. The plaintiff's motion for judgment on the award was overruled. Defendant's objections were sustained; the court, however, did not reject or set aside the award, but refused to enter judgment thereon. Plaintiff appeals.

Williamson & Nourse, for the appellant.

Kasson & Finch, for the appellant.

WRIGHT, C. J.—Two exceptions were taken to the award: First. That it was not filed within the time required by the submission. This objection is untenable.—The award, by the terms of the submission, was to be filed within five days after the arbitrators had concluded their labors, and not within five days after the date of their meeting. It was made on the 18th, and filed on the 23d, and by excluding the first, and including the last day, (Code, section 2513), it was delivered, or returned, within the five days. We do not stop to inquire whether it would not be good as a statutory award, though filed after the expiration of the five days, if made at the time fixed by the submission.

The second objection is, that the agreement of submission was not acknowledged as required by law. The Code provides that all controversies which might be the subject of a civil action, may be submitted to arbitrators, and requires the parties to sign a written agreement, specifying the demands submitted, the names of the arbitrators, and the court by which judgment on their award is to be rendered. The

Fink v. Fink.

parties are then required to appear before some justice of the peace of the county, and acknowledge the instrument, by them signed, to be their free act and deed. Code, sections 2098-9, and 2100. It is also provided by section 2102, that a submission to arbitration of the subject matter of a suit, may also be made by an order of court, upon agreement of parties, after suit is commenced. Where long accounts are to be examined, the court may refer the matter to referees. Section 1829. Any or all matters involved in a suit, may be submitted to these referees, unless one of the parties object thereto. A different number of referees may be fixed upon by consent. When the parties cannot agree upon referees, the court may appoint them, or allow each party to select one, and itself choose a third. 1795-6. And then it is provided generally, that referees may be appointed in the cases, and for the purposes provided by law; and that they shall have certain powers, be subject to specific rules, and receive the compensation therein named. Code, chapter 9, 7. All of these rules are applicable to arbitrators, except as in chapter 119 is otherwise expressed, or except as agreed upon by the parties. tion 1203.

From these provisions we deduce, for the purpose of the present question, these propositions: First. That parties may submit a controverty to arbitration, that might be, but as yet is not, the subject matter of a suit. Second. That they may submit by agreement, and without any order of court, any, or all the matters involved in any suit then pending between them. Third. That the subject matter of a suit may also be made, by order of court, upon agreement of parties.

In the first and second cases, the agreement of submission must be acknowledged, as required in section 2100, but in the third, it need not be. The order of the court, in such a case, stands in the place of the acknowledgement. If not acknowledged, when required, the award cannot be received

School District No. Two of Madison Township, Polk Co. v. Rogers.

and adopted as one made under a statutory submission, but it may still be good as at common law, and an action maintained thereon, as upon any other agreement. Code, sec. 2115; Conger v. Dean, 3 Iowa, 463.

In this case, the submission was made, of all the matters involved in a suit then pending, by agreement, but without any order of the court. The agreement, therefore, should have been acknowledged, to authorize the adoption and judgment upon the award, as upon the verdict of a jury. There was, consequently, no error in the action of the court. It would not have been proper to reject it, but the true course was to leave it, as the court below did, without action. We need not say that plaintiff has an ample remedy by an action upon the award.

Judgment affirmed.



School District No. Two of Madison Township, Polk County, v. Rogers.

Where a suit is brought in the name of a school district, on a promissory note made payable to certain persons by name, as school directors, and their successors in office, the fact that the note is made payable to them and others as directors, in the absence of any showing that the payees have a direct legal interest in the note, does not show that they have such an interest as renders them incompetent as witnesses.

Where a note is executed in consideration of a sale of real estate, and it is made to appear that the conveyance was to be made upon the payment of the purchase money, the two acts are so far dependent, that the plaintiff, in an action on the note, must show a performance, or an offer to perform, the contract on his part, unless the defendant has waived a tender of the deed.

Where in an action on a promissory note, it appeared that the consideration of the note, was a house and lot, sold by plaintiff to defendant, a deed of conveyance of which was to be made on the payment of the money; and where the court was asked to charge the jury as follows: "That if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof, he must show that he has

School District No. Two of Madison Township, Polk Co., v. Rogers.

made and tendered, or offered to make and tender, to the defendant, a conveyance of the real estate," which instruction the court refused to give; *Held*, That the court erred in refusing to give the instruction.

Appeal from the Polk District Court.

WEDNESDAY, APRIL 13.

Surr upon a promissory note. The note is made payable to Hopkins, and others, by name, as school directors, and their successors in office, and the suit is brought in the name of the school district. On the trial, Hopkins was offered as a witness for the plaintiff, and permitted to testify.

It appeared in evidence, that the consideration of the note sued on, was a house and lot sold by the plaintiff to the defendant, a deed of conveyance of which was to be made by the plaintiff to the defendant, on the payment of the note. The court was asked to charge the jury, that "if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof, he must show that he has made and tendered, or offered to make and tender, to defendant, a conveyance of the real estate," which instruction was refused. Judgment for the plaintiff, and the defendant appeals.

Cassady & Crocker, for the appellant.

T. E. Brown, for the appellee.

STOCKTON, J.—The first question is, whether Hopkins, as payee, was rightfully admitted as a witness for plaintiff. In the absence of any evidence, showing that the witness had a direct, certain, legal interest in the suit, we think the fact that the note was made payable to him and others, as school directors, does not show that he had such an interest as to render him incompetent to testify, in a suit brought upon the note in the name of the school district. As school director, he was merely the agent, or trustee, of the dis-

Bates v. Robinson,

trict; and though the payee of the note, was not the real party in interest.

In refusing to give the instruction, we think the court erred. Under the issue joined, and under the evidence before the court, we think the instruction was proper to be given. Where it is made to appear, that the conveyance was to be made upon the payment of the purchase money, the courts regard the two acts as so far dependent, that it is held that to entitle the plaintiff to recover, he must show a performance, or offer to perform the contract on his part, unless the defendant has waived a tender of the deed. 2 Hilliard on Vendors, 71; Bank of Columbia v. Hagner, 1 Peters, 467; Leonard v. Bates, 1 Blackf., 172; Woods & Hobert v. Morgan, Morris, 179; Ib., 380.

Judgment reversed.

BATES v. ROBINSON.

The word "property," in the act entitled "An act to amend section 1848 of the Code of Iowa," approved January 24, 1853, includes all the other kinds of property mentioned therein; and when the affiant in an affidavit for a writ of attachment, has made oath that the debtor has property, it is not intended to compel him to specify in what the property consists.

A party asking an attachment, is not required to specify in his affidavit the kind of property owned by the debtor, and to stake his truth and his attachment upon his ability to prove the ownership of that particular species of property.

It is not essential that the affiant in his affidavit for a writ of attachment, should sign the oath; and the affiant is as liable to the penalties of perjury if he does not sign, as if he does.

Where a petition, after stating the cause of action, alleged the facts necessary to authorize the issuance of an attachment, to which the clerk of the district court annexed his jurat, over his signature, certifying that "A. S., one of the attorneys for the plaintiff, makes oath that the matters and things stated in the above petition, are true," &c.; Held, That the petition was sufficiently subscribed and sworn to.

While it is the better practice, and desirable in all cases, where the oath

Bates v. Robinson.

is made by one not a party, or one not presumed to have the information, that the affiant in an affidavit for a writ of attachment, should state his means of knowledge; yet such a statement is not essential in such an affidavit.

Under the act entitled "An act to amend section 1848 of the Code of Iowa," approved January 24, 1853, the refusal to pay, or secure, the debt by property, is the essential act; and requires no further intent, or averment of intent, in the affidavit for the writ of attachment, than is implied in the fact and averment of refusal.

Appeal from the Greene District Court.

WEDNESDAY, APRIL 13.

This action was commenced by attachment, the petition alleging, that the defendant has property, goods, or money, or lands and tenements, or choses in action, which he refuses to give in payment or security of the debt. On motion of the defendant, the court quashed the writ of attachment, from which order the plaintiff appeals. The other material facts, are sufficiently stated in the opinion of the court.

Bates & Phillips, for the appellant.

John A. Kasson, for the appellee.

WOODWARD, J.—This is an appeal from a decision of the court, in quashing and setting aside a writ of attachment. The attachment was sued out under the act of January 24th, 1853, (acts 1853, 143), and the averments and affidavit are substantially in the usual manner.

I. The first cause assigned for the motion is, that the petition does not state, with a reasonable certainty of meaning, that the defendant has any property not exempt, &c., his statement being in the alternative, that he has "property, goods, or money, or lands, or choses in action." The defendant argues that it is void for uncertainty, and that the statute intended some one fact, by the assertion of which

Bates v. Robinson.

the affiant's conscience would be tried; and not that he should swear to a conjecture.

From the very circumstances of the case, a creditor is not to be presumed to have a very definite knowledge of a debtor's property, and we hardly think the law intended to pin down his affidavit to a specific thing—as money or goods, for instance, and stake his truth and his attachment, upon his ability to prove the ownership of that particular species of property. It will be observed that the first word in the statute, in this connection, "is property," a generic term, including all the others; and the meaning is, that he has property-namely, goods or land, &c.; the averment thus meaning that he has property of some sort, which is liable, and which he refuses to give; and then proceeding to state that it consists in one or the other of the kinds It seems difficult to give any other construction to the language, for the word "property" is absolutely general, and specifies no kind. When the affiant has made oath that the debtor has property, we think it is not intended to compel him to specify in what it consists.

II. The second objection is, that the petition is not sworn to by the plaintiff, nor is it signed, nor does the affiant state whether he has any, nor what means of knowledge. In regard to these objections, the circumstances are, that the facts are stated in the principal petition, and the clerk annexes a jurat, certifying that "Andrew Slatten, one of the attorneys for the plaintiff, makes oath that the matters and things stated in the above petition, are true," &c., and this is signed by the clerk.

It is not essential that the affiant should sign the oath. It is officially certified. There are many instances in which the affiant never signs. Such is the case with many motions, affidavits, and similar papers in the proceedings of the courts. The affiant is as liable to the penalties of perjury, if he does not sign, as if he does. It is believed that signing is not necessary, unless especially required. Histman v. Gerrard, 1 Harr., 124.

Bates v. Robinson.

Upon the exception that the affiant does not state his means of knowledge, we need only say, that there is no very clear ground upon which we can hold this essential in an affidavit for an attachment, although it is the better practice, and desirable in all cases where the oath is made by one not a party, or one not presumed to have the information. That he does not show that he is an agent or attorney, is objected in the argument only, and not in the motion.

III. The third cause assigned for quashing is, that neither the plaintiff nor the affiant, states that he believes that the defendant did the acts charged, to defraud his creditors. This intent is connected with some of the causes of attachment mentioned in the Code, (sections 1848 and 1852), but it is not required in regard to the cause here alleged, under the act of 1853, namely, that the debtor had property, which he refused to give in payment, or in security. In the other cases, this intent is necessary to give a character to the act. Thus a conveyance of property may be lawful and proper, but to make it a ground for attachment, it must be done with the intent to defraud. But under this act, the refusal to pay, or secure by the property, is the essential act, and requires no further intent, or averment of intent, than is implied in the fact and averment of refusal. See Danforth et al. v. Carter et al., 1 Iowa, 546; Hart v. Cummins, 1 Iowa, 565.

The record does not indicate upon what ground the court sustained the motion to quash, and having examined the causes assigned, and finding none of them sufficient, we are of opinion that the attachment should not have been set aside, and the judgment of the district court thereon, is reversed.

Vol. VIII.-41

Harris et al. v. Stone.

8 322

HARRIS et al. v. STONE.

Where a lot in a town site, entered in pursuance to an act entitled "an act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1853, is wrongfully conveyed by a county judge, the grantee becomes a trustee for the rightful owner; and in order to compel a conveyance from the trustee, it is not necessary for the owner to tender, or offer to pay to the trustee, the amount paid by him to the county judge for the lot.

Appeal from the Pottawatamie District Court.

WEDNESDAY, APRIL 13.

The petitioners allege that they were the In Chancery. actual occupants and owners, of a certain lot in the town of Council Bluffs, and as such were entitled to a deed from the county judge of Pottawatamie county, who had entered the town site of Council Bluffs city, pursuant to an act of Congress, and the laws of this state, for the use of the several owners and occupants; and that respondents knew of their right, but that fraudulently, and with intent to injure and defraud said complainants, and without having any right thereto, wrongfully procured the said county judge to make to him a deed to said lot. The prayer is, that he be declared their trustee, holding the lot for them, and be decreed to convey the same to them. To the bill there was a demurrer, for the reason that it did not aver a tender of the money paid by respondent to the county judge, at the time of procuring the deed. This demurrer was sustained, and complainants not amending, judgment was rendered against them for costs, from which they appeal.

R. L. Douglass, for the appellants.

Clinton & Buldwin, for the appellee.

WRIGHT, C. J.—The county judge of Pottawatamie county, entered the town site of Council Bluffs, and held

Harris et al. v. Stone.

the same in trust for the several use and benefit of the occupants thereof, according to their respective interests. In the execution of the trust, in the disposal of the lands entered, and the proceeds of the sales thereof, he was to be govered by such rules and regulations as were, or might be, prescribed by the general assembly of this state. Act of Congress, of April 6, 1854; 10 Stat. at Large, 273. The general assembly, by an act approved January 22, 1853, (Laws of 1853, 145), made it the duty of the county judge, to execute and deliver to each person, who, as an occupant, might be entitled to the same, a deed in fee simple for his lot or lots, the said occupant paying his due proportion of the purchase money of said land, and the other amounts in said law specified. Hall v. Doran, 6 Iowa, 433.

In relation to this town site, the county judge is a naked trustee, holding the property for the use and benefit of the occupants purely and exclusively. In case of contest between two persons claiming the same property, he has no judicial power; but it is his duty to withhold the title from either, until their respective rights may be settled and adjudicated by the courts of the country. 4 G. Greene, 376. As between the parties to this action, (taking the bill as true), it was his duty to have turned them over to the judicial tribunals, and to have made no conveyance, until their respective rights were there investigated and determined. Having made the deed, however, the grantee becomes the trustee for the rightful owner or occupant, if it shall turn out that he (the grantee), has not such right. And the question now is, whether, in order to compel the execution of this trust, it was the duty of complainants to tender or offer to pay respondent the amount paid by him to the county judge. We think not.

The general and ordinary rule is, as claimed by respondent, that complainant must aver and prove a tender, of the purchase money, or the amount required of him, before demanding his deed. This rule, however, like most others, has its exceptions; and, in applying it, we must have ref-

Harris et al v. Stone.

erence to its reason and policy. The law requires of no party an unnecessary act; nor is a rule to be adhered to where the reason of the rule ceases. If A. wrongfully obtains possession of the horse of B., replevin will lie, without a previous demand and refusal. If A., having the title to the land of B., wrongfully refuses to convey it, B. need not demand a deed, nor tender any money, that might, in the absence of such refusal, be necessary. So, if instead of refusing in words, A. (or, in this case, the respondent), wrongfully obtains the title, with a knowledge of complainants' right, and with intent to injure and deprive them of their title, the refusal is shown, or results from his acts, and a tender would be a vain and unnecessary thing. That it would have been the duty of complainant to tender the necessary amount to the county judge, before they could compel him to convey, there can be no question. He stood as a trustee, supposed to be ready to discharge his duty as required by law. The respondent is, however, according to the averment of the bill, a wrong doer-one who has, voluntarily, without any request of complainants, but against their will, and without any legal obligation resting upon him in that respect, procured the title, which in equity belongs to complainants; and he is in no position to ask that they shall follow him up and tender the money which he has so wrongfully paid. The very paying of this money, shows that he occupies the position of an adversary, denying their right, notwithstanding any offer by them to pay: and that a tender would be as unavailing as the demand of a deed.

Judgment reversed.

LOWEN v. CROSSMAN.

An action before a justice of the peace, in which the plaintiff claimed to recover for the work and labor of his son, for five and a half months, at ten dollars per month, &c. The defendant answered in writing, denying the plaintiff's claim, and averring that he contracted with plaintiff, for the hire of the services of his son, for one year, at the price of \$75 00; and that the son worked five and a half months, when he was taken away by the plaintiff, who refused to permit him to work for defendant any longer, and claiming damages for the breach of the contract. this answer, no replication was filed. On appeal to the district court, the plaintiff filed a demurrer to so much of the answer, as alleged that the contract was for the labor of the son for one year, &c., which demurrer was sustained, and so much of the answer stricken out; Held, That by sustaining the demurrer, the defendant was deprived of his right to show that he had sustained any damages by reason of the failure of the plaintiff to perform his part of the agreement, which damages he had the right to set off against the plaintiff's claim for compensation for the labor of his son for five and a half months, and that the proceeding was erroneous. (WRIGHT, C. J., dissenting.)

Appeal from the Keokuk District Court.

THURSDAY, APRIL 14.

Surr upon an account, before a justice of the peace. The plaintiff claimed of defendant, for the work and labor of his son, five and a half months, at ten dollars per month, and for one sheep-skin, at seventy-five cents. The parties appeared before the justice, and defendant filed his answer in writing, denying any indebtedness, and averring that he contracted with plaintiff for the hire of the services of his son, for one year, at the price of seventy-five dollars; that the son worked five and a half months, when he was taken away by the plaintiff, who refused to permit him to work for defendant any longer; and he claims damages for breach of contract. To this answer, the transcript fails to show any replication by the plaintiff. There was a trial before the justice, and judgment for the plaintiff, for \$34, 75.

On appeal to the district court, the plaintiff, without ob-

jection, filed a replication to the defendant's answer, denying all the averments of the same. Afterwards, the plaintiff filed an additional replication, in which it is alleged that if there was any contract for service by plaintiff's son, for any certain length of time, with defendant, his said son had a right to terminate the contract, and leave the defendant's service, on account of the ill-treatment received by him from defendant, and because the house of said defendant was an improper place for him to live; and that it was plaintiff's duty to cause him to quit the said place.

The defendant moved the court to strike out this amended replication, for the reason that the same makes a new issue, not raised on the trial before the justice, and for the reason that a party cannot, on an appeal to the district court, from a justice of the peace, file additional pleadings, changing the issue in the cause. The motion was overruled, and issue was joined on the replication, by a rejoinder thereto.

The plaintiff filed also a demurrer to so much of the defendant's answer, as alleges that the contract was for the labor of plaintiff's son for a year, and that he left the defendant's service before the expiration of the year, without This demurrer was sustained by the court, and that part of the answer stricken out. The cause was submitted for trial to the court, instead of a jury, and the court found the following facts: That plaintiff agreed that his son should work for defendant one year, for the sum of seventy-five dollars; that the son began to labor for defendant, September 20, 1856, and continued for five months and twentyseven days, the benefit of which labor was received by defendant; that at the end of said time, the son left the service of defendant, of his own accord, without any fault of defendant, and without his consent; that such services were worth to defendant \$31 60; that he should be charged with the value of the sheep-skin at seventy-five cents; and that he had paid on the account ninety cents.

Judgment was thereupon given for the plaintiff for \$31 45. From this judgment, the defendant appeals.

Rice & Loughridge, for the appellant.

No appearance for appellee.

STOCKTON, J.*—The cause was tried before a justice, upon the issues made, whether the plaintiff was entitled to the sum claimed, as compensation for the labor of his son; whether the agreement was that the son should labor for defendant for one year; and whether defendant had sustained any damage by reason of the failure of the son to work for the whole time agreed. These issues seem to have been fairly made, and on the trial, the judgment of the justice was for the plaintiff.

When the cause came into the district court, not only did the court permit the plaintiff to make a new issue, by putting in an additional replication to defendant's answer, but allowed him to file a demurrer to so much of the answer as averred that the contract between the parties was, that the plaintiff's son was to work for one year, and sustained the demurrer to the same, striking out all that portion of the answer. By this means, the defendant was deprived of his right to show that he had sustained any damage, by reason of the failure of the plaintiff to perform his part of the agreement; which damage he had the right to set-off against the plaintiff's claim for compensation for the labor of his son for the five and a half months.

It is not necessary for us, at this time, to consider whether there was error in the permission given by the court to the plaintiff to file a replication in the district court, changing the issue upon which the cause was tried before the justice. The more material matter to be considered, is the ruling of the court in suffering the demurrer to be filed in the district court, and in sustaining the demurrer, whereby the issue joined by the replication and rejoinder, were entirely superseded, and no issue left for trial, but the simple question

^{*}WRIGHT, C. J., dissenting.

whether the plaintiff was entitled to the amount claimed for the labor of his son, for five and a half months.

We think this course of proceeding calculated to prejudice the rights of the defendant. It deprived him of his undoubted privilege, of showing that the contract having been for the labor of the plaintiff's son for a year, and he having failed to labor for that length of time, the defendant had suffered damage by reason of such failure, which he was entitled to set-off against the plaintiff's claim for the services of his son, for the length of time that he did labor for defendant. For the error in sustaining the demurrer to the defendant's answer, the judgment of the district court will be reversed.

Judgment reversed.

WRIGHT, C. J., dissenting.—I dissent in this case, for the reason that it is reversed upon a point not made, nor referred to by counsel for either party. The ground of objection, made by the demurrer to the answer, was that though the son of the plaintiff was hired to the defendant, to work for a year, and left without cause, before the expiration of the time fixed, the plaintiff might nevertheless recover, relying upon the doctrine of Britton v. Turner, 6 N. H., 481, and followed by this court in Pixler v. Nichols, ante 106. This is the ground upon which it was sustained, as I gather from the entire record—a conclusion fully and entirely warranted, from the fact that this is the question, and the sole question, made by counsel, on this part of the case, in their arguments. The thought that by sustaining the demurrer, defendant was deprived, on the trial, of his right to set-off his damages, by reason of the failure of the plainiff to fulfill his contract, is not intimated in the argument, and is first suggested in the opinion. If it appeared that this was denied him, or if the point had been made that the answer was good for the purpose of letting in proof of such failure, I should, perhaps, not differ from the conclusion arrived at by the majority of the court. In the absence of McCall v. Butterworth.

anything of this kind, however, I think it best to confine our examination to the points made, and not to reverse a cause and send it back, for an error that counsel, by their silence, treat as practically and actually unimportant.

There is a wide difference between affirming and reversing a case, upon a point not made by counsel. quently the case, and in most instances the duty, of the appellate court to sustain the action of the court below, if from an examination of the entire record, a point can be found to justify it, though such point may not be made by counsel, And this, upon the well known and statutory rule, that we will always presume in favor of, and never against, the correctness of the proceedings in the inferior tribunal. It is very different, however, when a cause is to be reversed. We are justified in hunting, (that word expresses my meaning), for reasons to sustain, but not to reverse, a case. counsel insist that a case ought to be reversed on one ground, I certainly will not overrule him upon that, and send it back upon some other; such a practice is, in effect, giving a party a new trial, upon a ground that he does not urge; and decides questions to which the attention of neither party has been directed.

McCall v. Butterwortii.

In an action for damages, for failing to obey a subpœna, the question whether it was served or not, is a matter of proof for the plaintiff on the trial.

In such an action, the return of service upon the subpœna, is not conclusive upon the parties; and the plaintiff is entitled to show on the trial, as a matter of fact, independent of the return of the officer, that the writ was duly and legally served.

In an action for damages, for failing to obey a subpœna, it is not indispensably necessary, that the return of the officer, should show that a copy of the subpœna was delivered to the witness.

Where a witness is a party to a suit in which his attendance is required, no technical objection to the regularity or sufficiency of the subpœna, Vol. VIII.—42

McCall v. Butterworth.

should be suffered to prevail, in a suit to recover damages for failing to obey the same.

It is error to set aside a petition for damages, for failing to obey a subpœna, on motion or demurrer of the defendant, for the reason that no service of the subpœna had been made upon defendant, which he was bound to obey.

Appeal from the Hamilton District Court.

THURSDAY, APRIL 14.

This was an action to recover damages for failing to obey a subpæna. The defendant appeared, and moved the court to set aside the petition, for reasons set forth in the motion. The record entry states: "This cause coming on for hearing on the defendant's motion to dismiss; motion to dismiss sustained; and the plaintiff failing to further prosecute the same, the same is dismissed, at the costs of said plaintiff." The bill of exceptions states that "the defendant filed his demurrer or motion to set aside the petition; which said motion or demurrer was sustained by the court, for the reason that no service of the subpæna had been made upon the defendant, which he was bound to obey; and set aside the said petition." Plaintiff appeals.

Hull & Dennison, for the appellant.

J. A. Kasson and D. O. Finch, for the appellee.

STOCKTON, J.—The motion to set aside the petition appears to have been treated by the parties, and by the court, as a demurrer; and as no question has been made upon the regularity of this practice, we proceed to consider the cause, without expressing any opinion, whether or not, the motion was properly allowed, in this case, to take the place of a demurrer to the petition.

The district court sustained the motion, and set aside the petition, for the reason that no service of the subpœna had been made upon the defendant, which he was bound to obey. The plaintiff avers that the subpœna was legally and duly

Bailey v. Harris.

served on the defendant by the sheriff of the county. Whether it was so served, or not, was a matter of proof for the plaintiff on the trial. The subpœna having been made a part of the petition, and attached thereto, the defendant relies upon the return of the sheriff, indorsed thereon, as showing that the service was not sufficient. The return, even if insufficient, is not conclusive on the parties. The plaintiff was entitled to show, on the trial, as a matter of fact, independent of the officer's return that the writ was duly and legally served, as alleged. It is not indispensably necessary that the return of the officer, should show that a copy of the subpœna was delivered to the witness. This may be shown by other testimony, and is only required to be shown to render the party liable for contempt of court, in not obeying the writ.

The objection that the subpœna does not state the time and place, when and where the attendance of the witness is required, is not well taken. This information, we think, is conveyed with sufficient distinctness. Where the witness is a party to the suit, in which his attendance is required, no technical objection to the regularity or sufficiency of the subpœna, should be suffered to prevail.

Judgment reversed.

BAILEY v. HARRIS.

8 831 95 575

Where there is an express stipulation in the sale of personal property, that the property shall not be the vendee's until the price is paid, he cannot be regarded as a purchaser, and the title does not pass to him; and a sale of the property by the vendee, while it is in his possession, to a third person, without notice, vests no title thereto in the purchaser. (WRIGHT, C. J., dissenting.)

Appeal from the Allamakee District Court.

THURSDAY, APRIL 14.

Bailey v. Harris.

Replevin, for blacksmith's tools. The plaintiff had left the tools in the possession of one Kingsley, with an agreement, "that if Kingsley should pay to plaintiff, the amount of a certain promissory note, (\$60 00), then in the hands of J. T. Clark, the title of said tools was to become vested in Kingsley; if not, the title was to remain in plaintiff." The note was not paid according to agreement; and Kingsley, soon after, sold and delivered the tools to defendant.

The cause was tried by the court; and this being all the evidence, the court ruled that the sale to the defendant by Kingsley, gave to him the absolute title in the property, as against the plaintiff; and that the plaintiff could not part with the possession of the property to Kingsley, under such conditional sale, and retain the title thereto, as against subsequent purchasers, without placing his agreement with Kingsley upon record, or without notice, as required by law. Judgment was thereupon given for the defendant; to which ruling and judgment of the court, the plaintiff excepted, and now appeals.

John T. Clark, for the appellant.

No appearance for the appellee.

STOCKTON, J.*—By the terms of the agreement with Bailey, Kingsley had no right of property in the blacksmith's tools, until the payment of the note left with Clark. This note not being paid, according to agreement, Kingsley could pass no valid title in the tools to the defendant, and the plaintiff might resume the possession of the property at his option. 1 Parsons on Contracts, 449 and 441.

In Sargent v. Gile, 8 N. H., 325, furniture was delivered to one Wilson, upon a contract that he should keep it six months, and if within that time, he should pay for it, he

^{*} WRIGHT, C. J., dissenting.

Bailey v. Harris.

was to have it at cost, but otherwise, he was to pay twentyfive per centum upon the cost, for the use of it. sold and delivered the furniture to the defendant, who knew nothing of the contract upon which Wilson received it. was held by the court, that as there was an express stipulation that the property should not be Wilson's, until the price was paid, he could not be regarded as a purchaser, and no property passed to him; and that the contract by which he gained the right to purchase, gave him no right to sell, and the goods still remained the property of the plain-See, also, Copland v. Bosquet, 4 Wash. C. C., 594; Porter v. Pettingill, 12 N. H., 299; Gambling v. Read, 1 Meigs, 281; Bigelow v. Huntley, 8 Verm., 151; Barrett v. Pritchard, 2 Pick., 512. In New York, it has been held, that a bona fide purchaser, without notice of the conditional sale, will be entitled to hold the property. Haggerty v. Palmer, 6 Johns. Ch., 437; Keeler v. Field, 1 Paige, 315; Smith v. Lyons, 1 Selden, 41. Upon an examination of the authorities, however, we are satisfied with the ruling in Sargent v. Gile, and hold accordingly that the plaintiff was entitled to recover.

Judgment reversed.

WRIGHT, C. J., dissenting.—In this case, the delivery of the personal property was complete to Kingsley. Harris purchased in good faith, without notice, actual or constructive, of the right reserved by Bailey—or that the sale made was conditional. In my opinion, while the parties to such a sale, should be, and are bound by its terms, and as between them the title remains in the vendor, as to subsequent purchasers and existing creditors, without notice, acting in good faith, and purchasing for a valuable consideration, the title is in the vendee. I think the rule as found in the New York cases, is a safe one, and much more in accordance with the letter and spirit of our registry laws, than that adopted by the majority of the court. The point of difference is well understood, and therefore I need not now say more.

Goodpaster v. Voris et al.

GOODPASTER v. Voris et al.

- A promissory note is not over-due, until the days of grace have expired; and the bona fide indorsement of a note on the second day of grace, will cut off any equity or set-off, which the maker may have against the payee.
- The refusal of the court to give a defendant the opening and close of the case, on the ground that he has admitted the demand of the plaintiff, and set up new matter, is not a ground upon which to base an appeal, nor upon which error can be assigned.
- Where in an action on a negotiable promissory note, the defendant answered, admitting the execution of the note, and the assignment thereof, "after maturity and dishonor," and pleading a set-off against the payer of the note; Held, 1. That the admission of the assignment was materially qualified; 2. That the defendant had not so admitted the plaintiff's cause of action, as to allow his claim.
- Where a promissory note, dated the first day of September, and payable in ten days after date, was indorsed on the 13th day of September; *Held*, That the note was not over-due when indorsed.
- Where in an action by the indorsee of a promissory note, against the maker, dated the first of September, payable in ten days after date, and indorsed on the 13th of the same month, to which the defendant pleaded a set-off against the payee, the court suppressed a deposition designed to prove the set-off; *Held*, That the set-off could not prevail against the indorsee, and that the deposition was properly suppressed.
- Where a party to a suit is present in court, he may be called upon as a witness, without being served with a subpœna, but the court cannot compel him to testify; and if he refuses to testify, he must submit to the alternatives provided by sections 2421 and 2422 of the Code.

Appeal: from the Marshall District Court.

FRIDAY, APRIL 15.

The defendants gave their promissory note, on the first of September, 1856, payable to W. H. Hamilton, or bearer, in ten days after date, which was indorsed by the plaintiff, on the 13th of September, 1856. To the petition, the defendants answered, admitting the giving the note, and also the assignment, "after maturity and dishonor," and then pleading a set-off of a claim against the payee for damages, for the non-performance of a contract to furnish and set up

Goodpaster v. Voriis et al.

a circular saw in the steam-mill of the defendants. The verdict and judgment were for the plaintiff, and the defendant appeals. The other facts appear in the opinion.

H. C. Henderson and T. Brown, for the appellants.

Thomas Wilson, for the appellee.

Woodward, J.—1. The error first assigned is, that the court refused to give defendants the opening and close of the case, which they claimed, upon the ground that they had admitted the plaintiff's demand, and set up new matter. This is not a proper matter upon which to base an appeal, nor for the assignment of an error. Nor, if it were, has the defendant so admitted the plaintiff's cause of action, as to allow his claim. The admission of the assignment is materially qualified; and besides, the answer does not present a defense, nor yet an avoidance, as they sometimes term it, but they plead a set-off, which is in the nature of a cross-action. This, standing alone, would give them the right to the position they claim, but they do not clearly admit the plaintiff's cause; and we allude to it for the reason that they confound it with matters of defense.

2. The second error assigned, is the refusal to admit the deposition of one Edwards. This was designed to prove the matter of the set-off, and the court held that this could not be urged against the plaintiff, he being an indorsee before the note became due. A copy of the note is given in the statement. The defendants urged that it was over-due when assigned, for that the days of grace were not to be regarded in a question of this nature. The note was dated the 1st of September; was due in ten days, that is on the 11th, and the days of grace would run to, and include, the 14th. It was assigned on the 13th day. It was not overdue when indorsed, and the set-off could not prevail against the indorsee, the plaintiff, and of consequence, the deposition was not admissible to prove it against him.

Upon the proposition that a promissory note is not over-

Goodpaster v. Voris et al.

due, until the days of grace are passed, we would refer to a few authorities, as either holding this expressly, or involving it in other points ruled. Byles on Bills, 262; Bank of Utica v. Wager, 2 Cow., 766, in which interest was cast including these three days, and the court say, that "for every practicable purpose, the days of grace are a part of the note itself;" Hogan v. Cuyler, 8 Cow., 203, which says that it cannot be sued during these days; Ross Lead. Ca., 409, note. A presentation on the second day of grace, is premature. Leavitt v. Simms, 3 N. H., 14; and Savings Bank v. Bates, 8 Comst., 505, is a very similar case. It was there held that the maker had no right to pay it to any one, until the third day. A bank held the note as indorsee, and failed, and on the first day of grace he offered to pay it in bills of the branch, which they refused. He held the bills to offer on the third day, but on the second day of grace, the bank assigned the note to the plaintiff. The court held that the days of grace constitute a part of the original contract. and that its negotiability was as unrestrained during these days as before their commencement. They say that a negotiable note, payable in sixty days, is, in law, one payable in sixty-three days, and during that time no demand can be made; and if negotiated on the sixty-first or sixty-second day, it is not negotiated over due.

3. The third assignment, is to the refusing to compel the plaintiff to testify, without being subpænaed regularly, he being present in court when called upon by the defendant as a witness. If the party were duly summoned by subpæna, he could not be compelled actually to testify, but he might submit to the alternatives mentioned in section 2421-2 of the Code. It is understood, therefore, that the defendant claimed, that the party being present in court, might be called upon as a witness, without being served with a subpænea. The court ruled according to this view, and held that he was obliged to take the position of a witness, being so called upon. We think this was correct. The object of the summons is only to give notice

and to call the witness in, and if he is already in court, he requires no further notice. A witness who is not a party cannot make this objection, and neither can the party. In legal theory, he is already in court, and always prepared to testify the truth.

Therefore, there being no error found in the judgment aforesaid, the same is affirmed.

DUNCAN v. HOBART et al.

Where a party amends his pleadings, after a demurrer has been sustained to his answer, he waives the right to object in the appellate court, to the ruling of the court in sustaining the demurrer; and where the second answer admits, under oath, the correctness of the plaintiff's claim, this rule should be rigorously enforced.

The act entitled "An act to amend section 1763 of the Code, and amendatory of the law providing when cases in courts of record shall be tried," approved March 22, 1858, was not designed to continue every cause to the second term after its commencement, but to continue the trial on contested cases, and not those in which there was a default, or in which the whole cause of action was admitted.

Water in a proceeding to forcelose a mortgage, under chapter 118 of the Code, judgment was entered for the amount found to be due the plaintiff, ordering a forcelosure, and awarding a special execution against the property; *Held*, That the judgment did not cut off the right of the defendant to redeem before the sale, under the special execution, and followed substantially the provisions of the Code.

Appeal from the Marshall District Court.

FRIDAY, APRIL 15.

This was a "civil action in the district court," commenced in September, 1858, to foreclose a mortgage, under chapter 118 of the Code. As required by the petition, defendants answered under oath. To this answer, there was a demurrer, which was sustained. Another answer was then filed, duly verified, "admitting the justice of the plaintiff's claim." Defendants then moved to continue the cause until the next

Vol. VIII.-43

8 337 121 552

term, for the reason that no judgment could legally be entered, until after one continuance. This motion was overruled, and judgment entered for the amount found due plaintiff, ordering a foreclosure, and awarding a special execution against the property. Defendants appeal.

E. W. Eastman, for the appellants.

T. Brown and H. C. Henderson, for the appellee.

WRIGHT, C. J.—It is objected that the demurrer to defendant's first answer, was improperly sustained. Without examining this answer, we dismiss it with the remark, that if the rule that a party, by answering over, waives his right to make such an objection in this court, should ever be rigorously enforced, it should be in a case like this, where the second answer admits, under oath, the entire justness and correctness of the plaintiff's claim. After this admission, there was nothing left of law or fact to try; for the right of the plaintiff to recover, in manner and form as prayed for in his petition, was fully conceded.

And this brings us to the second question presented by appellants, and that is, was it proper, against defendant's objection, to enter judgment at the first term. The Code provides (section 1763), that, "except when otherwise provided, causes shall be tried at the first term after they are commenced, unless reasonable cause for a continuance be shown." This section was amended by chap. 127, of Laws of 1857-8, 249, by substituting second for first before "term," but retaining every other word of the section. In our opinion, the law of 1858 was not designed to continue every cause to the second term after its commencemeent. tion 1737 of the Code, a defendant is required to demur, or answer, or both, on or before the morning of the second day of the term at which he is required to appear, unless the court, by general rule, or special order, otherwise direct; and then, by section 1824, it is provided that, if the defendant fail

to file his answer, or other pleading, by the time prescribed, judgment by default may, on motion of the plaintiff, be entered against him. As we understand these sections, a class of cases is provided for, different from those contemplated by the law of 1858. Section 1763, of the Code, gave the general rule, that causes should be tried at the first term after they were commenced. The language of the section. however, clearly recognises exceptions to this rule; for it is said, "except where otherwise provided, causes shall be tried at." &c. One exception is to be found, where there has been a return of "not found," and an order of publication is necessary; for the delivery of the original notice to the sheriff, with intent that it be served immediately, is a commencement of the action. Section 1663. So the law of 1858 gives the general rule, that causes shall be tried at the second term after they are commenced. But exceptions to the rule are recognized, still; for it is said, "except where otherwise provided, causes shall be tried," &c. Now, if there is a default, or a failure to answer or demur, by the time required by the law, or the order or rule of court, the plaintiff is entitled to his default, and to his judgment. Such a case would fall among the excepted ones, and should not be continued to another term. And the same is true. in a more emphatic sense, where the defendant, by his answer, admits the truth or justice of the plaintiff's claim. It amounts, substantially, if not technically, to a confession in open court. And here we are brought to consider the meaning of the word "tried," as found in the amendatory act. If a plaintiff's cause of action is admitted, there is nothing And why shall a cause be continued for trial, when, from its pleadings, there is nothing to litigate? In such a case, to say that the plaintiff must wait another term, would make the law an engine of delay to an extent that would bring it into just and merited reproach. If it was intended to make the first an appearance term for all cases, it would have been easy to have said so. As it is, the intention was, as we infer from the language used, to continue to the sec-

ond term after their commencement, the trial on contested cases, and not those in which there was a default, or in which the whole cause of action was admitted.

Finally, it is urged that there was error in decreeing the foreclosure of defendant's equity of redemption. And here appellants raise the question, whether, under our law, the mortgagor has the right to redeem, after the rendition of the judgment, or the sale of the mortgaged premises. question is one of very general importance—has been very hastily presented by counsel—and as we do not deem its disposition necessarily involved in the determination of the present cause, we conclude to leave it open until more directly and fully involved and discussed in some subsequent case. As we understand the judgment, in this case, it follows substantially the provisions of the Code. It does not undertake to bar and foreclose, absolutely and at once, the defendant's right to redeem. Whether such an order could be made, or the effect of it when made, seems not to have entered into the consideration of the court, at the time of rendering judgment. This much is very clear, that it was, at least, not intended to cut off the right to redeem before the sale under the special execution; and as to the effect of the sale upon this right, the judgment is equally silent. We say that the right to redeem before the sale, is not cut off. And this is manifest from the very fact of ordering the sale. This is the means provided by the law, and contemplated by this judgment, to enforce the collection of the mortgagee's debt. And to accomplish this seems to have been the object and purpose of the judgment. Beyond this, the court did not go-nor was it necessary.

Judgment affirmed.

DRUMMOND v. STEWART.

Where it appeared from the record of a cause, "that heretofore, to-wit: on the 28th of May, 1858, an amended petition was filed," and that the cause had been tried at a former term, when the verdict was against the defendant, but the judgment was arrested, and a new trial granted, and thereupon the plaintiff filed the said amended petition; and where, it being at least the second term after the commencement of the suit, the defendant claimed that he was entitled to a continuance, under the act entitled "An act to amend section 1763 of the Code, and amendatory of the law providing when causes in courts of record shall be tried," approved March 22, 1858; Held, That the defendant was not entitled to a continuance.

Where in an action on an attachment bond, the plaintiff alleged that he offered to give the defendant, as attaching creditor, security from his property, and among other things, offered to assign to him his books of account; and where on the trial, in order to show what amount was due on his books, and that the persons against whom the accounts stood, were responsible, he called a witness, who testified that the demands on the books amounted to about \$700 00, and that the debtors therein were responsible men, but he could not then recollect their names, nor the amounts due from them respectively, and could give the names of but three persons—to which evidence the defendant objected, for the reason that the books should be produced; *Held*, That the evidence was competent, with, or without the books.

In an action on an attachment bond, the writ of attachment and the officer's return thereon, is admissible in evidence.

Where an attachment de facto has been made, the defendant in an action on the attachment bond, cannot set up as a defense, that the process which he had sued out and set a going, was not executed in accordance with law; nor will the defective service of the writ of attachment, render the writ void.

Under the act entitled "An act to amend section 1848 of the Code," approved January 24, 1853, which prescribes additional causes for which attachments may issue, the attachment is allowed when the debtor will neither secure nor pay the debt with his property. The law gives to the debtor the right to elect, and if he is willing to do either, there is no such wrong intent or purpose, as will warrant an attachment.

In an action on an attachment bond, where the attachment was sued out under the act of January 24, 1853, on the ground that the debtor had property which he refused to give either in payment or security of the debt, the admissions of the creditor, that the debtor had offered to secure the debt, if proved, are conclusive against him, unless qualified in such a way as to destroy their force.

Where a debtor offers to transfer sufficient property to reasonably secure or pay the debt, the fact that the creditor thought that he could not make his money out of the security as soon as he wanted it, affords no ground for an attachment under the law of January 24, 1853.

Where in action on an attachment bond, the court instructed the jury as follows: "That it is no justification nor mitigation of damages, that the original indebtness or note, was a just claim, and that the creditor recovered judgment upon the same. It does not entitle a party to an attachment, simply because his claim is just. Some one of the causes laid down in the statute, must exist, or the suing out of the attachment is wrongful;" Held, That the instruction was correct.

Appeal from the Monroe District Court.

FRIDAY, APRIL 15.

This was an action upon an attachment bond, sued out under the act of January 24, 1853, alleging that the writ was not only wrongfully sued out, but also wilfully wrong. The defendant pleaded a general denial, and certain special matters. The facts sufficiently appear in connection with the errors assigned. Verdict and judgment for the plaintiff, and the defendant appeals.

T. B. Perry, for the appellant.

Noffsinger & Whitney, for the appellee.

Woodward, J.—I. The error first assigned is, that the court refused a continuance at the term when the cause was tried. The record opens with the statement, that "heretofore, to-wit: on the 28th of May, 1858, an amended petition was filed," and it appears that the cause had been tried at a former term, when the verdict was against the defendant, but the judgment was arrested, and a new trial granted, and thereupon the plaintiff amended his petition; and that this was a second trial, and at least a second term, but the record does not show when the action was commenced.

In this state of the case, the defendant claimed the right to a continuance, under the act of 22d of March, 1858,

(Acts 1858, 249), arguing that the amendment of the petition, placed the cause upon the same ground as if it were then first commenced. The court overruled the motion, and correctly, as we think. The temporary act above referred to, provided that causes should be tried at the second term after they were commenced, unless cause were shown for continuance. The ruling of the court was within the very letter of the act, and an amendment did not take the case out of the spirit and intent of the provision. The defendant had had one continuance, and he was not entitled to another under the act above cited.

The plaintiff alleges that he offered to give the defendant, as attaching creditor, security from his property, and, among other things, offered to assign him his book of In order to show what amount was due on the books, and that the persons against whom the accounts stoods, were responsible, he offered one Crawford as a witness, who testified that the demands on the books amounted to about \$700 00, and that the debtors therein were responsible men, but he could not then recollect their names, nor the amounts due from them respectively. He could give the names of but three of the persons. The defendant objected to this answer and testimony, and also objected for the reason that the books should be produced. court overruled the objection, and admitted the testimony, and this is the second error alleged.

The testimony was unquestionably competent, and it was so, either with, or without the books. There was no necessity for the plaintiff to produce the books, in the first instance; and if the defendant wanted them, he should take the proper steps to cause them to be brought in. Had he been refused, on such an application, it might be ground for complaint, but this testimony was admissible without the books. The bill of exceptions does not show in what relation to Drummond, Crawford stood—whether as clerk or othwise, nor his means of knowledge. His inability to men-

tion the names of the debtors on the books, was a matter affecting his credibility only, and was for the jury to consider. The plaintiff avers that he offered security to the defendant; and as a part of it, offered to assign his book His main object, then, on the trial, after showing this proposition, was to show what the book of accounts The principal matter to be obtained from the witness, was his opinion of that worth. This the book could not show. It would show some of the elements upon which the question of worth rested-such as the names of the debtors, and the amount which each owed, but these matters were not such as demanded the book for their proof. From a previous examination of it, the witness could have formed as clear an idea of its value, as if it were present in the court. Then, if the defendant would rebut him, and desired the book, he should give notice for its production.

Under the same assignment, the defendant suggests as error, the admission of the writ of attachment, and the officer's return thereon. The same question was made, and the admissibility of these papers determined, in *Raver* v. *Webster*, 3 Iowa, 502; *McGinnis* v. *Hart*, 6 Iowa, 204.

The defendant argues that the return does not show a legal levy—a proceeding according to statute; and that, therefore, it is void, and no levy. The defect assigned is, that it does not show that the officer gave notice to the defendant, nor that he gave notice to the person occupying the premises. Passing by the consideration that these matters would not render the attachment void, we remark that it would be a strange defense for the creditor to make, that the process which he had sued out and set a going, was not executed in accordance with law, where an attachment defacto had been made.

III. The third assignment is, that there was error in giving the instructions asked by the plaintiff. These instructions are fifteen in number, and we shall notice them so far only as the defendant refers to them in his argument.

The first was, that if Drummond did refuse to mortgage

his property, but offered to give a sufficient amount in payment, Stewart had no right to his writ of attachment. This calls for a construction of the statute, and raises a question upon its meaning, which we do not recollect being moved before. But it is one of importance, and is well taken, for there is an ambiguity in the expression used by the statute. Its terms are: "which he refuses to give, either in payment or security of said debt." Will the refusal to do one of these things subject him to the writ, or must he refuse both? other words, can the creditor demand either, and make a refusal of that sufficient; or, has the debtor the election, and where requested to do the one, may he offer to do the other? The instruction says the latter, for it held, that though he refused to mortgage—that is, to give in security—yet if he offered to give in payment, the creditor cannot attach. We think this was right. The attachment is given because he will neither secure nor pay, with his property. If he is willing to do either, there is no such wrong intent or purpose, as will warrant the attachment.

Neither this instruction, nor any facts shown in connection with it, leads to the question suggested by defendant's argument, whether the creditor, having once refused to accept an offer of security or payment, would be precluded from ever making another demand. He argues that it may have been proved so and so; but he should show what was proven. This he does not do. The difficulty in regard to some of the instructions is, that there is no statement of the testimony.

IV. The fourth instruction was, that "Stewart's admissions that Drummond offered to secure, if proven, are conclusive against him, unless qualified in such a way as to detroy their force. It gives Stewart no ground for attachment under this law; that he sued it out, because he could not make his money out of it, [the security,] as soon as he wanted it, provided the same was reasonably sufficient to secure or pay the indebtedness sued upon." The appellant excepts to this, as containing the doctrine, that if he made Vol. VIII.—44

Drummond v. Stewart.

such admissions, he is precluded from attaching on any new circumstances, which may have arisen subsequently. This is not understood to be the sense of the instruction, and the case shows no evidence which would tend to give it this bearing. It would seem to apply to facts as they existed at one time, and there is nothing indicating the contrary, so that there is no error apparent. The instruction would not apply to a changed state of circumstances, and the word "conclusive" is not made a point of objection in it.

V. Exception is taken to the fifth instruction, also, which is the following: "It is no justification, nor mitigation of damages, that the original indebtedness, or note, was a just claim, and that Stewart recovered judgment on the same. It does not entitle a party to an attachment, simply because his claim is just. Some one of the causes laid down in the statute must exist, or the suing out of the attachment is wrongful." It is not stated that the court excluded this fact from the jury, but it was admitted with the above instruction, and we cannot see that there was error in it. The The fact that the plaintiff's claim instruction was correct. is a just one, does not entitle him to an attachment. claim may be just, and yet the attachment wrongful, and even wilfully wrong. It is the converse of this proposition, that has weight, where the plaintiff fails in his action, and then it has weight, according to the circumstances of the case. The attaching plaintiff may believe his demand entirely true, and yet fail; or, he may be correct in this, and yet be wrong, and even malicious, in suing out his attachment.

VI. The defendant then objects to the tenor of the plaintiff's instructions, generally, urging that they go to the extent of holding, that the plaintiff is entitled to recover, though the defendant may have had good reason to believe the facts to be true, which are sworn to, and he cites Raver v. Webster, 3 Iowa, 504. It is true that that case, and Mahnke v. Damon, 3 Ib., 107, hold that the plaintiff's ground for believing the facts stated to be true, is the true test, but

Farr v. Fuller.

we do not understand the court to controvert this doctrine, but rather the contrary. And we see no error in the matter assigned.

It may be that the appellant has failed to present his case as he designed, in consequence of not causing the evidence to be certified, but we see no cause for reversing the judgnent, and it will stand affirmed.

FARR v. FULLER.

It is perfectly competent for the district court, to order a new trial, when satisfied that an error has been committed, to the prejudice of either party, whether exceptions were taken to the action of the court at the time, or not.

The correctness of instructions, in most, if not in all cases, depends upon the facts or circumstances developed upon the trial; and where their applicability or irrelevancy is not shown, by a bill of exceptions, embodying sufficient of the testimony, the appellate court cannot determine upon their correctness, nor determine whether the court erred in granting a new trial, on the ground that they were erroneous.

Appeal from the Polk District Court.

FRIDAY, APRIL 15.

TRESPASS. Trial and verdict for defendant. Motion for a new trial sustained, and defendant appeals. The other material facts sufficiently appear in the opinion.

Cassaday & Crocker, for the appellants.

S. Sibley, for the appellee.

WRIGHT, C. J.—The record shows that the new trial was granted, "for the reason that the instructions to the jury were, and are, erroneous." These instructions were asked by the defendant and given, and are all embodied in the bill of exceptions. It does not appear that plaintiff made any ob-

8 \$47 86 615 Farr v. Fuller.

jections to said instructions, at the time they were given; and the defendant now insists that it was too late to do so, after the rendition of the verdict. To sustain this position, we are referred to the rule recognized by this court, in Rawlins v. Tucker, 3 Iowa, 213, and other cases, to the effect that a party will not be allowed to assign error upon instructions to which he made no objections at the time they were given. This case does not come within the rule referred to, for the reason that the court below has, by granting a new trial, admitted the error in giving the instructions, and taken steps, at the earliest possible moment, to correct the same. It was perfectly competent for the district court, upon its attention being called to the motion, to order a new trial, when satisfied that an error had been committed to the prejudice of the plaintiff, whether exceptions were taken to the action of the court at the time, or not. While we would not have interfered, if the motion had been overruled, neither will we when granted.

The appellant claims, however, that the instructions were correct, and upon this position he mainly relies to reverse the cause. It seems that defendant relied for his defense upon the fact, that the house, or shanty, (the subject of the trespass), was built by himself—was not attached to the land—was not a fixture; and that he, therefore, had a right to remove, doing no injury to the land of plaintiff. This appears more from the instructions asked by defendant, than from anything else, for no part of the testimony is before us, nor any of the other instructions, if any others were given.

The correctness of instructions, in most, if not all cases, depend upon the facts or circumstances developed upon the trial. It is frequently as injurious to a party to give an instruction abstractly correct, but which is inapplicable to the case on trial, as to give one ever so erroneous. To give a correct instruction upon a point, as to which there is no testimony, is frequently calculated to confuse or mislead a jury, and may be the means of as positive injury and preju-

Lyons v. Frazier.

dice, as if the law had been entirely misstated. And upon the same principle it is, that we frequently are unable to determine whether there was, or was not, error in refusing an instruction, where its applicability is not shown by proper bill of exceptions, embodying sufficient of the testimony.

In this case, the new trial was granted, for the reason that the instructions were erroneous. By this we understand, not alone necessarily, that as abstract propositions they were erroneous, but erroneous under the circumstances of the case. Without something more than appears from this record, we cannot say that there was error in this conclusion. We can well conceive of a state of a case, in which it would have been entirely proper to have refused the instructions, when asked; and if so, then that same state of case would justify the granting a new trial, after they were erroneously given.

State the argument thus: Suppose that the error complained of was in refusing these instructions. It is manifest that we could not say that they should have been given, for the reason that there is nothing to show their applicability. They have been given, however, and the court below has granted a new trial, for the reason that they should have been refused, or that in giving them, there was error. It seems to us equally manifest, that we cannot say that the motion was improperly sustained.

Judgment affirmed.

Lyons v. Frazier.

The question whether two persons are rightly sued jointly in the county where one of them resides, cannot be tried by taking issue upon the facts stated in an affidavit of one of them, for a change of venue, on the ground that he resides in a different county than that in which suit was commenced.

An action of trespass against two defendants, F. and T., commenced in Alamakee county. At the return term, F. filed a motion for a change of

Lyons v. Frazier.

the venue of the cause, as regarded himself, to Clayton county, for the reason that he was a resident of that county, and averring in his motion, that he did not jointly with T., commit the trespass complained of; that whether guilty of committing the act singly and alone, he neither admits nor denies; and that T. was sued jointly with him, for the purpose of compelling him to come to trial in Alamakee county, and not because the said T. was guilty. The plaintiff demurred to the motion. The court overruled the demurrer, and informed the plaintiff, that he could take issue upon the facts stated in the motion, and ordered a jury to be impanneled to try T. upon the issues so presented, which should determine the question of jurisdiction over F. The plaintiff declined to go to the jury upon the grounds suggested by the court—whereupon the court discharged T., and ordered a change of venue as to F., and awarded him thirty dollars, for his expenses; Held, That the proceeding was erroneous.

Appeal from the Alamakee District Court.

FRIDAY, APRIL 15.

The plaintiff sued the two defendants, jointly, in the county of Alamakce, in trespass, for killing a mule, the property of the plaintiff. At the return term, Frazier filed a motion for a change of the venue of the cause, as regarded himself, to Clayton county, for the reason that he was a resident of that county, and not of Alamakee; and further averring, in his motion, that he did not, jointly with Town, commit the trespass complained of; that whether guilty of committing the act singly and alone, he neither admits nor denies; and that Town was sued jointly with him, for the purpose of compelling him to come to trial in Alamakee county, and not because said Town was guilty.

The plaintiff demurred to this motion, seeming to regard it as a plea in abatement. The court overruled the demurrer, and directed the plaintiff that he could take issue upon the facts in the defendant's motion, and ordered a jury to be impanneled to try the defendant, Town, upon the issues so presented, which should determine the question of jurisdiction over Frazier. The plaintiff's counsel declined to go to the jury upon the ground suggested by the court;

Lyons v. Frazier.

and thereupon the court discharged the defendant, Town, and ordered a change of venue in respect to Frazier, and awarded him thirty dollars for his expenses. To this proceeding the plaintiff excepted, and it constitutes the ground for the assignment of errors.

John T. Clark, for the appellant.

Woodward, J.—The proceeding was erroncous. The rule concerning suing in a wrong county, is ordinarily more applicable to cases where one is sued alone. This is a case where two are sued, for a supposed joint trespass, and where they may be joined, if both are guilty, or if the plaintiff believe them so; he taking his risk of the consequences in case it should appear that there was no cause against the one who is brought from his own county. We will not say that the above rule may not be applied to such a case, when the proper stage is arrived at; but it cannot at the point where it is attempted here. Where an action is brought against two or more resident defendants, it must be commenced in the county where some of them dwell; and others will, of necessity, be drawn from the place of their residence, if they reside in different counties.

The question whether two are rightly sued, jointly, cannot be tried in the manner directed by the court. It was erroneous to order the plaintiff to take issue on the motion of the defendant, Frazier, and thus try a part of the case. Substantial issues, like these, cannot be tried upon motion. This seems so clear, that it does not seem requisite to spend time in discussing it. The court erred in ordering the issue on Frazier's motion, in discharging Town, and in ordering a change of venue in respect to Frazier. Therefore the judgment is reversed, and the cause is remanded, with directions to proceed therein as required by law.

Pittman & Bro. v. Searcey.

PITTMAN & BRO. v. SEARCEY.

Where an attachmeet is sued out under section 1848 of the Code, on the ground that the defendant is, in some manner, about to dispose of, or remove his property out of the state, without leaving sufficient remaining for the payment of his debts, the affidavit should also allege that such disposition or removal of the property, was with the intent to defraud creditors.

Where it is assigned as error, that the court would not permit a party to amend his affidavit for a writ of attachment, or that the order quashing the writ, was made unconditionally, the record should show that the party asked leave to amend, and that such leave was refused by the court; and unless these facts appear from the record, it is not shown affirmatively that there was error.

Whether a motion to quash a writ of attachment constitutes a special or general appearance, the defendant has the right to appear and object to the writ; and his subsequently making default, is no ground of complaint to the plaintiff.

Appeal from the Lucas District Court.

FRIDAY, APRIL 15.

Surr upon a promissory note, commenced by attachment. As a ground for the attachment, the petition alleged, that the defendants were about, in some manner, to dispose of, or move their property out of the state, without leaving sufficient remaining for the payment of their debts. The defendants, "for the purpose of appearing to the attachment branch of this case, and for no other purpose," moved that the attachment be quashed, for the following reasons:

- 1. The petition does not state in what manner said defendants are about to dispose of their property, or whether said defendants are about to dispose of their property, or remove it out of the state.
- 2. The said petition does not aver that the said disposition or removal of property, is done with the intent to defraud creditors.
- 3. The affiant to the petition does not show that he is informed of the facts stated therein, or that he is the agent

Pittman & Bro. v. Searcey.

or attorney of plaintiff, and as such authorized to make the affidavit.

The motion was sustained, and the attachment quashed, from which order the plaintiff appeals.

Williamson & Nourse, for the appellant.

No appearance for the appellee.

Woodward, J.—It does not appear for which of the three causes assigned, the court sustained the motion, or whether for all. The attachment was prayed under section 1848 of the Code, and the petition and affidavit allege, that the defendants were, in some manner, about to dispose of or remove their property out of the state, without leaving sufficient remaining for the payment of their debts, which are the words of the statute.

The above section mentions several classes of causes for the issuing of an attachment. A portion of them depend upon an intent, and a portion are not thus dependent. one case, the necessity of the intent to defraud his creditors, is expressed—that is, where the debtor has disposed of his property, in whole or in part. And in Lockhard v. Eaton, 3 G. Greene, 543, it is held that this intent is also necessary to be alleged, where the cause of attachment is, that he is in some manner about to dispose of, or remove his property out of the state, without leaving sufficient remaining for the payment of his debts. It is not desirable to reason upon this question, at this time, but refer to the considerations presented in that case, and in Bowen et al. v. Gilkison et al., 7 Iowa, 503, in which the case of Lockard v. Eaton is followed. By these cases it is now settled, that the intent to defraud his creditors, should be averred in respect to both the acts above referred to; and as this point disposes of the case so far as relates to the attachment, it becomes useless to pursue the other objections urged to the ruling of the court in quashing the attachment.

But there are one or two other points to be noticed. It is Vol. VIII.—45

Pittman & Bro. v. Searcey,

assigned as error, that the court did not permit the party to amend his affidavit, or that the order to quash was made unconditionally. It does not appear by the record, whether the court gave leave to amend or not, nor whether the plain-The record is silent, merely statiff applied for such leave. ting that the motion to dissolve, was sustained and the attachment quashed. Then the question really is whether the record must show that such leave was given, or whether the plaintiff must cause it to appear, that he applied for leave, and We do not think it error, if the record that it was refused. does not show affirmativel # that permission was given. The party should apply for leave, and cause it to appear of record, if it is refused. This does not stand upon equal ground with the case, where a demurrer to the petition, for instance, has been sustained, in which the judgment, (in our practice), is properly a respondens ouster, and shows that, upon failure to answer over, judgment is rendered. present case, there is nothing showing that leave to amend was refused. If it was so, the party should have caused it to appear of record. The counsel refers to Drake on Attachments, as saying that judgment should be conditional, but the edition to which we have access, does not sustain this position.

Another error is alleged to exist, in the court permitting a special appearance of the defendant to the attachment proceedings, and entertaining the motion to quash, upon such an appearance. The appearance of the party may have amounted to one in full, or to a general one for all purposes, but yet, admitting that the coming in for this purpose is, in effect, a full appearance, it does not lie with the court to prevent the party making a default afterward, in the action. He has the right to appear and make the objection, and his subsequently making default, is no ground of complaint to the plaintiff. We do not undertake to say whether such an appearance is, or is not, one in full. It is not necessary to determine this, but whichever it may be,

The State of Iowa v. Rankin.

we do not know how he could be prevented making default in the action.

Therefore, as it does not appear that there is error in the record or the judgment aforesaid, the same is affirmed.

THE STATE OF IOWA v. RANKIN.

The testimony of a wife, when called as a witness on the part of her husband, in a criminal case, is not to be marked and distinguished from that of other witnesses; she is entitled to be regarded as others are, and to stand free and unembarrassed upon her own character.

Where in a criminal case, in which the wife was called as a witness, and testified on the part of her husband, the court instructed the jury as follows: "The law permits the wife to testify for her husband in a criminal cause, but her peculiar relation to her husband, renders it incumbent on the jury to examine her testimony with peculiar care and caution, and if, from the whole testimony, they are satisfied that what she said is true, they should give her testimony the credit of any other witness. But if, from her testimony, taken together with that of other credible witnesses, the jury are satisfied that what she said was false, they should reject it altogether; *Held*, That the instruction was erroneous.

Appeal from the Des Moines District Court.

SATURDAY, APRIL 16.

INDICTMENT for assault with intent to kill. On the trial, the prosecution called as witnesses, E. C. Hall, Abial Hall, and Maria Hall, who testified against the defendant. The wife of the defendant was then introduced on his part, whose testimony differed materially from theirs. She was the daughter of E. C. Hall, and the sister of the other witnesses.

The court instructed the jury as follows: "The law permits the wife to testify for her husband in a criminal cause, but her peculiar relation to her husband, renders it incum-

The State of lows v. Rankin.

bent upon the jury to examine her testimony with peculiar care and caution; and if, from the whole testimony, they are satisfied that what she said is true, they should give her testimony the credit of any other witness. But if, from her testimony, taken together with that of other credible witnesses, the jury are satisfied that what she said was false, they should reject it altogether."

The defendant excepted to this instruction. A verdict of guilty was rendered, and he appeals.

Browning & Tracy, for the appellant.

S. A. Rice, Attorney General, for the state.

Woodward, J.*—We think this instruction should not have been given. It is very similar to that in *The State* v. *Guyer*, 6 Iowa, 263, which this court held erroneous. No essential difference between them is perceived. The testimony of a wife is not to be thus marked and distinguished, from that of other witnesses. She should not be thus subjected to suspicion. Her relation to the defendant is, of itself, sufficiently calculated to excite this, and such remarks from the court, go to the jury with great weight, and add unjustly to the burden which that relation puts upon her. She is entitled to be regarded as others are, and to stand free and unembarrassed, upon her own character. And this is a right of the defendant, also. When the law made her a witness, it placed her upon the stand just as it places others there.

The instruction is the more noticeable, as the other witnesses were of her own family, and thus standing between these near relatives and her husband, there was a more than usual presumption of uprightness.

Besides these considerations, the instruction requires that

^{*}WRIGHT, C. J., dissenting.

The State of Iowa v. Rankin.

she should be supported by the evidence of others, before she can be believed. We might say, that it takes away all weight from her festimony, when taken alone. If, from the whole of the testimony, taken together, they are satisfied that what she says is true, they should give her testimony the credit of any other witness. What does this mean, but that they are to look away from her, first, to see if she is supported by the others? What weight does this leave for her evidence where, as in this case, she is opposed by others? It leaves it a perfect blank; so that it would be futile to offer her testimony, in the very cases where it is most wanted—that is, where she differs from the others, or where the defendant wishes to contradict them.

The instruction should not have been given, and the judgment must be reversed, and the cause remanded.

WRIGHT, C. J., dissenting.—With some hesitation, I wrote and concurred in the opinion delivered in the case of The State v. Guyer, 6 Iowa, 263. Subsequent thought has not strengthened by confidence in its correctness. I do not say that I now believe it to be incorrect, but I am not prepared to go beyond the principles and rules there recognized. The above conclusions of the majority does this, as I think, and therefore I cannot concur.

I do not understand that the instruction recognizes the rule that the wife is to be supported by other evidence, before she is to be believed. While the first part of the charge, is not clothed in so objectionable language as in the case of The State v. Guyer, and while I should hesitate very much in holding it erroneous, I think all chance for prejudice is removed, by taking the instruction and considering it as a whole. I construe it thus: "The wife stands in a peculiar relation to the husband, and by reason of this relation, her testimony should be examined with peculiar care and caution. It is to be taken and considered, however, with all the other testimony, and when thus examined, is to be re-

Cooley v. Hobart et al.

ceived or rejected, according as it may be believed to be true or false. Thus construed, I cannot regard it liable to any fair or reasonable objection. Jurors examine the testimony of all witnesses in this way, so far at least, as to compare that objected to, with all that may be offered, in arriving at truth. In this view, (and I cannot treat it otherwise), the instruction is relieved of the objectionable features found in the Guyer case, and is not erroneous.

COOLEY v. HOBART et al.

In a proceeding to foreclose a mortgage, where the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition, is due and owing, there is nothing for the plaintiff to prove.

The fact that a mortgage was executed to secure the payment of a debt previously contracted, will not invalidate it; nor does it make any difference that it was executed by one of the members of a partnership and his wife, to secure the debt of the firm.

Where a petition to foreclose a mortgage, asks a judgment on the note, and a foreclosure of the mortgage, there is no union of law and equity in one proceeding; and the judgment prayed for is authorized by section 2084 of the Code.

Appeal from the Marshall District Court.

Monday, April 18.

Foreclosure. The mortgage was executed by Hobart and wife, to secure a note made by the firm of Hobart & Waterbury—said note dated prior to, but maturing after, the date of the mortgage. The judgment in the court below was, that plaintiffs recover against the firm the amount of the note, with interest; that the mortgaged premises be sold under a special execution; and that if the proceeds of said

Cooley v. Hobart et al.

sale were not sufficient to satisfy the said judgment, that a general execution issue against the makers of the note.

E. W. Eastman, for the appellants.

H. C. Henderson and T. Brown, for the appellee.

Wright, C. J.—It is urged that the answer of defendants, is not overcome by the testimony of two witnesses; that plaintiffs did not prove their claim; and that no consideration is shown for the execution of the mortgage. To all this, the answer is, that the defendants admit, by their pleadings, the execution of the mortgage and note, and they do not pretend to deny that the amount claimed in the petition is due and owing. There was, therefore, nothing for the plaintiff to prove, for their case was admitted. That the mortgage was given to secure a debt previously contracted, would not invalidate it. Nor does it make any difference that it was given by Hobart and wife, to secure the debt of the firm of which he was a member. 2 Hilliard on Mort., ch. 40, 338.

It is further objected, that the petition asks a judgment on the note, and a foreclosure of the mortgage, in the same action; and that thus there is a "union of law and equity in one proceeding." The answer is, that there is no such union, and that the judgment prayed for is authorized by the express language of the Code. Section 2084. The final adjudication was formerly called a decree; under the Code, it is called a judgment; but the substance and essence of the proceeding remains the same.

What is said in Sands v. Wood, 1 Iowa, 263, upon this subject, and which has been referred to by counsel, was thought necessary, by the writer of the opinion, under the peculiar circumstances of the case—it being a proceeding against the assignor, as also the mortgagor and maker of the note. It was not intended, by any means, to hold that a party could not ask and obtain a judgment in the same pro-

ceeding, against the maker for the amount found due on the note, and for the foreclosure of the mortgage. The difficulty in the mind of the writer was, that Wood was a party, who was indorser only, and that the claim against him was at law; and so presented the idea of a claim against him and Thompson on the note alone, and also one on Thompson only, on the mortgage—that is, the mortgage with its attendant note. The present case asks judgment against all the makers of the note, and a foreclosure of the mortgage given by one of them, to secure it. To this, there is no objection.

Judgment affirmed.

CAVENDER v. SMITH et al.

Where in an action of right, the plaintiff claimed title to the premises by a virtue of a judgment recovered by S. B. & Co. against S., the ancestor, February 17, 1840; a sheriff's sale on the 15th of May, 1841; a sheriff's deed to G. on the 18th of June, 1841; recorded August 18, 1841; and also claimed title under a second sheriff's decd to G., dated October 28, 1843, recorded on the same day, and a deed from G. to the plaintiff, dated May 31, 1844, and recorded on the next day; and where the defendants, to prove title in them, offered in evidence a judgment in favor of P. against the said S., rendered May 29, 1841; an execution thereon, dated June 19, 1845, under which the premises were sold by the sheriff, on the 27th of November, 1845, and a sheriff's deed, dated November 24, 1846; and also offered in evidence a second sheriff's deed, dated May 8, 1848, and a deed from W.-the purchaser at said sales-to G. F. S., one of the defendants, dated March 22, 1852, which evidence was rejected; Held, That the evidence was admissible, but that as it did not show any title to the premises in the defendants, the error in rejecting it, was immaterial.

A right of dower, where the dower is unassigned, cannot be set up as a defense in an action of right, against the person holding the fee of the land.

Where in an action of right against the widow and heirs of S., in which the plaintiff claimed under a judgment against the husband and father, the widow pleaded that she was the wife of the said S. at the time of

the recovery of the judgment, and continued so to be till the time of his death, and that she is entitled to dower in the premises, and to the possession of the dwelling house until her dower is assigned; to which the plaintiff demurred, for the reason that the facts stated in the plea constituted no defense, and that the widow's title to dower is inchoate, until it is set off, which demurrer was sustained; *Held*, That the demurrer was properly sustained.

While section 1397 of the Code, gives a widow the right to petition for an assignment of her dower, at any time after twenty days from the death of the husband, yet this right does not control the right of possession, which remains as at common law.

Where a widow's right to the possession of real estate comes under the law of dower only, and not under the law in relation to the homestead, she cannot claim possession by virtue of the latter.

In an action of right against the heirs of her husband, a widow, whose dower is unassigned, is not a proper party defendant; and if made a party, the judgment recovered by the plaintiff cannot affect her right of dower.

In an action of right commenced against the ancestor, and to which the heirs are made parties after his death, the heirs are not liable for damages for the rents and profits, while the ancestor was in possession of the premises. They are only liable for such time as they are shown to have been in possession.

In such a case, if the plaintiff seeks to recover damages from the ancestor, his administrator should be made a party, with the heirs, or a separate action should be instituted against him.

Appeal from the Des Moines District Court.

WEDNESDAY, APRIL 20.

This is an action of right, to recover the possession of certain real estate, commenced in 1848, against Jeremiah Smith. Upon his death, his widow and heirs were made parties defendant. Judgment for the plaintiff, and the defendants appeal. The material facts and the errors assigned, are sufficiently stated in the opinion of the court.

Browning & Tracy, for the appellants.

Hall, Harrington & Hall, for the appellee. Vol. VIII.—46

WOODWARD, J.—This cause has been before us on two former occasions. 1 Iowa, 306; 5 Iowa, 159. A brief statement of facts only, will be necessary.

The plaintiff claims by virtue of a judgment recovered by Smith, Brothers & Co., against Jeremiah Smith, the ancestor, February 17, 1840; a sheriff's sale on the 15th of May, 1841; a sheriff's deed to Grimes, on the 18th of June, 1841, and recorded 18th of August, 1841; also, a second sheriff's deed to Grimes, of October 28, 1843, and recorded on the same day; and a deed from Grimes to the plaintiff, of May 31st, 1844, recorded the next day.

The defendants make title under a judgment recovered by Smith Purcell, against Jeremiah Smith, on the 29th of May, 1841; and offered in evidence, to support their title: First. A deed of the 24th of November, 1846, made under an execution, dated June 19, 1845, and a sale on the 16th of August, 1845; Second. A deed dated 15th of June, 1847, under an execution of the 22d of August, 1845, and a sale on the 27th of September, 1845; and Third. A deed of May 8th, 1848, under an execution of December 10, 1846, and a sale of January 25, 1847; Fourth. A deed to George F. Smith, of March 22, 1852, from Isaac Whitsell, who was the purchaser under the foregoing sales.

The questions made at this time, and the errors assigned, arise under bills of exception, showing the following matters:

First. The defendants offered in evidence, the above judgment in favor of Smith Purcell, and against Jeremiah Smith, of May 29, 1841, with the executions issued thereunder, the certificates of sale, and the sheriff's deeds to Whitsell, and that from him to George F. Smith, one of the defendants—all of which are above mentioned, and which were, all singly, rejected by the court.

The same question, in effect, was made upon the former hearing of the cause, and was decided adversely to the position of the defendants. We see nothing in the attitude of the cause, at this time, which should change the opinion

then expressed. The defendants argue, that although Grimes purchased before the judgment in favor of Purcell, yet as he did not take a deed, and record it, until after the rendition of the Purcell judgment, the lien of the judgment under which Grimes purchased, was gone, and the lien of that in favor of Purcell intervened, and took precedence. The former opinion obviates this objection to the plaintiff's title, by the view that the lien of the judgment of Smith, Brothers & Co., (in February, 1840), possessed equal vitality as a lien, with that of Purcell, of May 29, 1841, and thus far, there was no reason why it should be held that the judgment last recovered should take priority.

But the defendants urge a further argument, in the present hearing of the case. They argue that the judgment lien, depends upon the power to sue out execution, and that the giving a delivery bond, stay bond, and the like, is a substitute for the lien of the judgment. Consequently, as Jeremiah Smith executed a stay bond, with surety, to stay the execution, for the term of six months, the lien of the judgment was taken away; and they cite Jones v. Peasely, 3 G. Greene, 52; and Brown v. Clark, 4 How., 4; 16 Curtis, 3.

Without discussing this, as a rule of law, but assuming it for the present, we may ask, what benefit will the defendants derive from it, for the same act which authorized the stay bond, made it a judgment confessed, and according to the same case of Brown v. Clark, no turther entry of judgment was necessary, but the bond per se constituted a judgment. This stay expired on the 15th of August, 1841, which was nine months before the judgment of Purcell. The execution, also, recites the fact of giving the stay-bond, so that, under this view of the case, it is a sufficient execution for such judgment.

Still, in strictness, these papers were admissible in evidence, and the court would, in ordinary course, have instructed the jury upon the effect of them, rather than reject them totally. But as the instruction would necessarily have

been, that they were insufficient to support the defendant's claim against the plaintiff, the course taken in rejecting them, became immaterial, for the effect was the same.

The error secondly assigned, is to the sustaining the demurrer of the plaintiff, to the answer of Ellen M. Smith, filed April 28, 1858. In this answer of Ellen M., she pleads that she was the wife of Jeremiah Smith, at the time of the recovery of the judgment under which plaintiff claims, and continued so to be till the time of his death, and that she is entitled to dower in the premises, and to the possession of the dwelling house until her dower is assigned. The demurrer to this answer objects, that the matter set up does not constitute a defense, and that her title to dower is inchoate, until it is set off.

It is not clear that the demurrer intends to raise the question of her right to dower, but the reverse is inferred, from the causes of demurrer assigned. And these are very properly assigned, for, as will appear hereafter, the right cannot be tried at this time, and in this manner. And besides this, her plea is, in reality, a plea which goes to the possession only.

But the leading question now is, whether the widow can plead this right against the plaintiff. The plea goes only to the right of possession. She claims to hold possession of the "mansion-house and messuage," until her dower is assigned. By Magna Charta, (chapter 7), the widow was allowed this possession, for forty days from the death, unless her dower was sooner assigned, which was called her quar-This is still the law in these states, save where statute has changed it. See the cases hereafter cited. the right of dower—the dower being unassigned—could not be set up against one holding the fee, after the expiration of the quarantine. Even the heir could expel her, and drive her to her action. Jackson v. Donaghy, 7 Johns., 247; Sheafe v. O'Neil, 7 M. R., 13; Moore v. Gilliam, 5 Munf., 346; Doe v. Natt, 2 Carr & P., 430; Chapman v. Armistead, 4 Munf., 382; 4 Kent, 61, 62; 1 Thos. Coke,

584; Grimes v. Wilson, 4 Blk., 331; 2 Ib., 260; Smith v. Addleman, 5 Ib., 406; Strong v. Bragg, 7 Ib., 62; Williamson v. Ash, 7 Ind., 495; Adkins v. Holmes, 2 Ib., 197.

The contrary doctrine has been held in New Jersey, in Halsey v. Dodd, 1 Halst., 367, so far as that she might set up this right, she being in possession, but this was under the statute. And the same has been held in Indiana, the statute lengthening her quarantine, as will be seen in some of the cases cited above.

In Jackson v. Donaghy, 7 Johns., 247, VanNess, J., says: "The only instance which has fallen under my observation, in which this construction of Magna Charta has been questioned, is a dictum of Gould, J., in the case of Goodlittle v. Newman, 3 Wells., 519, where he said that the court could not turn the widow out until her dower was assigned to her, but he was undoubtedly mistaken."

Her right is regarded as but a right in action. not an heir, neither is she a tenant in common with the She has no estate, until dower is assigned. right is to hold for the given time, and if dower is not set out, then to sue for it. See cases above, and Cox v. Jugga, 2 Cow., 638; Shields v. Butts, 5 J. J. Mar., 13. It cannot be set up as a failure of consideration, to a note given for the purchase money of the land. Smith v. Ackerman, 5 In some of the states, the widow is permitted, by statute, to hold until dower is assigned, as in New Jersey, North Carolina, and, perhaps, Indiana. 4 Kent, 61, and note. Our law, (Code, section 1397), gives her the right of action-or of petition, instead of it-at any time after twenty days from the death, but this does not seem to control the right of possession, which is presumed to remain as at common law.

But the law of later times, has introduced the homestead, and ours, (section 1395), provides that the dower shall be so assigned as to embrace this, unless she prefers a different arrangement. Although the right of dower may be gov-

erned by the law at the time of alienation, yet the mode of assignment would be directed by the law at the time of the death, or of the assignment, which are the same in this instance. As the widow's right, however, in this case, is under the law of dower only, and not in any degree under that of the homestead, she cannot claim possession by virtue of the latter.

But the counsel of this defendant argues, that although the plaintiff has not sued to recover her dower, yet if he recovers judgment, he recovers that and holds it, for she pleads it, and it is final. This, however, does not follow. She is not properly a party. In suing for the land, the plaintiff should sue the heirs alone, while the dower is yet unassigned. But he makes her a party, and she pleads the only right that was then in her-a right of dower; and if she cannot plead this, and the dower is not assigned, so that she may plead that, the judgment recovered by him cannot It cannot be rendered final against her, but against the heirs only—leaving her to apply for her dower Her position leads, of necessity, to this conclu-Her dower is not assigned, and there is no laches on her part in respect to it, for the husband has deceased during the pendency of this action. We do not mean to say, that there could be such laches, in this respect, as to give the plaintiff any better right, but that, if the idea had place under any state of things, it is not so here. Then she cannot plead her dower, because it is not set out; and the law does not permit her to plead the right alone, and it follows, of course, that the judgment recovered by the plaintiff, can only give him possession as against her, but leaving her "The widow's right of dower," says one claim untouched. of the cases, "is paramount to the right of the heirs, or their creditors, and is not prejudiced by anything which they have done." Crocker v. Fox, 1 Root, 227; Calder v. *Bell*, 2 Root, 50.

The foregoing remarks cover, also, the third, fourth, and

fifth assignments of error, which relate to the right of the widow to hold possession.

The sixth assignment is to the instruction that the plaintiff, if he recovered, would be entitled to damages for rents and profits, for the amount proven, for six years then last past.

The statute, (Code, section 2008), assumes the law to be, that the plaintiff, in an action for the recovery of real property, may recover also, for the use and occupation, by limiting the same to six years prior to the commencement of the action, and therefore we understand the objection to apply to the instructions, as it related to these defendants. The action was commenced in the year 1848, against Jeremiah Smith, himself, and so continued until 1852, or 1853, when he died. The cause was once sent back from this court, (1 Iowa, 306, and 5 Iowa, 159), to make the heirs parties, and it was not until October, 1857, that a guardian was appointed for some of the minor heirs, and at the April term, 1858, the defendants pleaded.

Under these circumstances, a judgment for the use and occupation for the full six years, could not be rendered against the heirs. It would be a judgment in personam, and stand against them individually. They are not thus responsible for the act of their ancestor. To recover these damages after the death of the ancestor, (unless the heirs are in possession), the administrator should have been made a party with the heirs, or an action against him should be instituted. But the heirs must be held liable from the death of the ancestor, if they were in possession, or from such time as they are shown to have had possession.

Before closing, it may be proper to call attention to the circumstance, that besides the reason above stated for rejecting the deeds, &c., offered in evidence by the defendants, one of them—that of June 15, 1847, under the execution of August 22, 1845, and the sale of September 27, 1845—does not contain the land in controversy; and that of November 24, 1846, contains a part only of the same,

namely, sixty acres. This objection to the first of these two, would sustain the rejection of it entirely.

In conclusion, the decision of the court upon the points assigned as error, must be affirmed, except that on the question of damages, which is reversed; and the plaintiff will be allowed to recover against the heirs only, and from the death of the ancestor, Jeremiah Smith, if in possession, or from the time of their having possession, as above held.

Reversed in part.



LIKES V. BAER.

Where a vendor becomes liable to a vendee, for the defective quality of goods sold, whether his liability arises through fraud or breach of contract, the measure of damages is the difference in value between goods corresponding with the representations made, and those actually delivered; and the same rule applies where there has been fraudulent misrepresentations in the sale of real estate.

Where in an action to recover damages for the false and fraudulent representations of the defendant, as to the quality and description of certain lands, sold and conveyed by the defendant to the plaintiff, the petition alleged that the plaintiff, being the owner of certain lands in C. county, the defendant proposed to purchase the same, and to give in exchange therefor, certain lands in R. county, representing said lands to be of a certain quality as to timber, &c., and that plaintiff, relying upon said representations, sold, &c.—all of which allegations were denied by the answer; and where on the trial, the defendant called a witness, and proposed to prove the value of the land conveyed to him by the plaintiff, and the improvements upon it, which was objected to, and the objection sustained by the court; Held, That the evidence was immaterial, and properly excluded from the jury. (WRIGHT, C. J., dissenting.)

In an action to recover damages for fraudulent representations in the sale of real estate, it is not error to charge the jury that the measure of damages, is the difference between the value of the land purchased of the defendant, as it was at the time of the purchase, and the sum that the land would have been worth at that time, if it had been such as it was represented to be by the defendant.

Where in an action for damages for fraudulent representations in the sale of real estate, the defendant asked the court to instruct the jury as follows: "That if the only testimony before them, in relation to the quality of

the land, is such representations as may be detailed to you by witnesses, uncorroborated by anything in writing, or any facts surrounding the transaction, such evidence should be looked to carefully by the jury," which instruction was given, with the following qualification: "But the declarations and representations of the defendant, in regard to the quality or condition of the land, during the trade, are important evidence, and should be considered by the jury;" Held, That both the instruction and the qualification were properly given to the jury.

Where in an action for damages for fraudulent representations in the sale of real estate, the defendant asked the court to instruct the jury as follows: "Hearsay evidence, or what may be said by parties, which may be given in evidence by witnesses, is, or may be, according to the circumstances, the weakest kind of testimony," which instruction the court refused to give; Held, That the effect of the instruction, if given as asked, would have been to attach the character of hearsay to the evidence given by the witnesses, as to what was said by the parties, at the time the agreement was made, as to the quality and character of the defendant's land, and that it was properly refused.

Appeal from the Mahaska District Court.

FRIDAY, APRIL 22.

This was an action to recover damages for the loss sustained by plaintiff, by reason of the alleged false and fraudulent representations of defendant, as to the quality and description of certain lands, sold and conveyed by defendant to plaintiff.

The plaintiff avers, that being the owner of certain lands lying in Clark county, Iowa, defendant proposed to purchase the same, and to give in exchange therefor, certain lands in Ringgold county, representing the lands in Ringgold county to be of a certain quality as to timber, &c.; and that plaintiff, relying on said representations of defendant, "traded with him, and sold him the said land in Clark county, and took in payment the land of the defendant in Ringgold county;" and that plaintiff afterwards ascertained that the said representations of defendant were false and untrne, and were made by l.im with intent to defraud the plaintiff; and that he has been thereby damaged to the amount of \$2,000.

Vol. VIII.-47

The defendant in his answer denies, specifically, the allegations of the petition, setting forth the plaintiff's cause of action, as well as the damages sustained, and denies that the lands of the plaintiff in Clark county was worth the sum of three thousand dollars, as alleged by plaintiff.

On the trial, exception was taken to the exclusion of certain testimony offered by defendant, and to certain instructions given and refused. There was a verdict for the plaintiff for \$1,400 00, and judgment. The other facts appear in the opinion of the court.

W. H. & J. A. Seevers, for the appellant.

S. A. Rice and Wm. Loughridge, for the appellee.

Stockton, J.*—Where a vendor becomes liable to a vendee, for the defective quality of goods sold, whether his liability arises through fraud, or breach of contract, the true measure of damages is the difference in value between goods corresponding with the representations made, and those actually delivered. Casey v. Gruman, 4 Hill, 626; Bærkins v. Bevan, 3 Rawle, 44; Cothers v. Keever, 4 Barr., 168. The consideration, or purchase money, although strong, is not conclusive evidence of such value. The same rule has been applied by this court, in case of the sale of real estate. Hahn v. Cummings, 3 Iowa, 583.

The plaintiff complains, in this case, that the quality of the land conveyed to him by the defendant, was falsely and fraudulently misrepresented to him, by the defendant, and that he was, by such misrepresentations, induced to make the exchange of lands. The damages are claimed for this misrepresentation, whereby it is alleged that the plaintiff has sustained a loss equal to the difference between the actual value of the land, and what it would have been worth, had it answered the description given of it by the defend-

^{*}WRIGHT, C. J., dissenting upon one point.

ant. Such, we think, is the true measure of the plaintiff's damages; and in this view of the subject, he was at liberty to object to any evidence of the value of land conveyed by him to the defendant, as immaterial. The court, therefore, did not err in ruling out the question to the witness, Sprague, as to what the land was worth, and what improvenents were on it; nor in refusing to give the instructions isked by defendant, as to the true measure of plaintiff's damages.

It is further to be observed, that the parties exchanged lands without anything being said by them as to the value of their respective tracts; and although the plaintiff alleges that the land conveyed by him, to defendant, was of the value of three thousand dollars, yet this is not a substantial averment of the petition, which shows by the whole tenor, that the plaintiff sought to have his damages measured, not by the difference in value between the two tracts of land, but by the difference between the actual value of the land conveyed to him, and the value of such land, as the defendant represented it to be. The defendant did not represent that his land was worth as much as plaintiff's; but that it was of a certain quality and character. Confiding in these representations, the plaintiff made the exchange, and if they turned out to have been falsely and fraudulently made, the defendant must answer in damages, in such sum as will make the plaintiff whole for all injury sustained by him, from such false representations.

The defendant urges that the court erred in charging the jury, that "the measure of damages was the difference between the value of the land purchased by defendant, as it was at the time of the trade, and the amount that the land would have been worth at that time, had it been such as it was represented to be by defendant.

If there was an error in this instruction, it was an error in favor of the defendant, of which he cannot complain. But we are of opinion that there is a clerical error here, and that the instruction read, "the land purchased of defend-

ant," and not "purchased by defendant." The whole tenor of the instructions given and refused, shows that this was the meaning of the court, if not its language; and even if the instruction is correctly copied into the transcript, we think the jury were not misled by it, to the prejudice of the defendant.

The court was asked by the defendant to instruct the jury, that "if the only testimony before them in relation to the quality of the land, is such representations as may be detailed to you by witnesses, uncorroborated by anything in writing, or any facts surrounding the transaction, such evidence should be looked to carefully by the jury." This instruction the court gave, with the qualification, that "the declarations and representations of the defendant, in regard to the quality or condition of the land, during the trade, are important evidence, and should be considered by the jury." The instruction, as asked, refers to the testimony of witnesses, as to the quality of the land. It was proper enough that the court should direct the jury, that this evidence should be carefully considered by them, as they should carefully consider all testimony given to them. But we think there was no impropriety in the court further directing them, that the declarations and representations made by defendant, upon the same subject, should be considered by by them.

The defendant further asked the court to charge the jury, that "hearsay evidence, or what may be said by parties, which may be given in evidence by witnesses, is, or may be, according to the circumstances, the weakest kind of testimony." This instruction the court refused to give, and such refusal is assigned for error. Hearsay evidence, in its legal sense, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person. Phillips on Evidence, 185; Greenleaf's Evidence, section 99. Hearsay evidence, as thus described, is uniformly held incompetent to estab-

lish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. The effect of the instruction, if given as asked, would have been to attach the character of hearsay to the evidence given by the witnesses, as to what was said by the parties at the time the agreement was made, as to the quality and character of defendant's land. This would have been to the prejudice of plaintiff's rights. The court might well have told the jury, that verbal admissions were to be received with great caution; but the instruction asked is very different from this, and we think the court was right in refusing to give it.

The motion in arrest of judgment and for a new trial, we think, were also properly overruled.

WRIGHT, C. J., dissenting.—In my opinion, the testimony of the witness, Sprague, should have been received.

THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY v. ROSSEAU.

Upon an appeal from an assessment of damages by a sheriff's jury, under the act entitled, "An act granting to railroad companies the right of way," approved January 18, 1853, the cause is to be heard upon its merits, and not upon exceptions taken to the action of the sheriff or jury, or to the competency of either of them, to act in the premises.

In such cases, the appeal is from the assessment of the jury, and in the district court the inquiry is, whether the owner shall be adjudged, or is entitled to, a greater amount of damages than was awarded him by the sheriff's jury.

When the case gets properly into the district court, upon appeal, it is there for trial upon its merits, and for no other purpose; and it is immaterial whether the sheriff, selecting the jury, was or was not, the agent of the railroad company; or whether the jury had, or had not, expressed opinions adverse to the rights of the owners of the land; nor can the appellant, upon appeal, review the alleged illegal acts of the officers, and have them corrected.

8 27 99 34

Upon appeal from an assessment of damages by a sheriff's jury, under the act granting to railroad companies the right of way, approved January 18, 1853, where it appears from the record that the jury were selected and required "to assess the damages done to each and every piece or tract of land in the county, in all cases not agreed upon with the owners of the land "—that the land owner was notified of the day when the assessment would be made—that on the day of the assessment, he gave notice of an appeal, and filed his bond—and that, afterwards, he filed with the sheriff his exceptions to the report of the jury—it is sufficiently shown that the owner of the land had refused to grant the right of way through his premises, and that the sheriff had power to have the damages assessed by a jury.

Appeal from the Washington District Court.

FRIDAY, APRIL 22.

In April, 1857, the sheriff of Washington county, was requested by the M. & M. R. R. Co., to appoint six freeholders of said county, not interested in a like question, to assess the damages done to lands therein, by the location of said road over the same, in accordance with sections 4 and 5 of chapter 31 of the Laws of 1853. These commissioners were selected, and required to meet on the 4th of May. "to assess the damages done to each and every piece or tract of land in the county of Washington, in all cases not agreed upon with the owners of the land." They were duly sworn, and the defendant notified by the company, that on a day named, these commissioners would be upon his lands, (describing them), for the purpose of assessing his damages, at which time and place he could attend, &c. On the day named, the commissioners met, and assessed the damages to several tracts of lands, owned by different persons, including the lands of the defendant. On the same day, defendant gave notice of an appeal to the district court, and afterwards gave bond, with approved security, conditioned to pay any amount legally adjudged against him, in the further prosecution of said cause.

Afterwards, the defendant filed with the sheriff his ex-

ceptions to the report of said commissioners, for the reason that they were not such persons as were by law authorized to make the assessment.

First and Second. Because the said jurors were selected by the said company, or by the sheriff, who, at the time, was the agent of said company, in procuring the right of way.

Third. The jurors had expressed opinions, prior to the appointment, adverse to the rights and interests of the owners of land over which the road was to pass, and in conflict with the rules of law, as declared by the courts of the state.

Fourth. Because said road was not finally located at the time of said assessment.

So much of said exceptions as relate to the agency of said sheriff, was sworn to by the attorney of defendant. The plaintiffs moved to strike said exceptions from the files, because they were improperly there, and not authorized by any law. This motion was overruled, and on defendant's notion, the report or assessment, was set aside, and the proceedings dismissed at the plaintiff's cost.

E. H. Ludington, and Cook, Dillon & Lindley, for the appellant.

Patterson & Schofield, for the appellee.

WRIGHT, C. J.*—The plaintiffs appeal, and assign for error:

First. The overruling of their motion to strike from the files the exceptions filed with the sheriff, to the report of the commisssoners.

Second. The refusal to continue the cause on their motion, for want of notice of the appeal.

Third. The order setting aside the award, and dismissing the cause.

^{*}STOCKTON, J., dissenting.

The first and third assignment must be sustained, and we need not, therefore, consider the second.

Chapter 31 of the Laws of 1853, provides, that if the owner of any real estate, on which a railroad corporation may desire to locate their road, shall refuse to grant the right of way through his premises, the sheriff shall, upon the application of either party, appoint six disinterested freeholders of his county, not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real estate, and assess the damages which the said owner will sustain, by the appropriation of his land for the use of said railroad corporation, and make a report to the sheriff, who shall file and preserve the same. But either party may appeal from such assessment to the district court, within thirty days after the same is made. Such appeal will not delay the prosecution of the work upon the road, if the corporation shall first pay or deposit with the sheriff the amount assessed; and unless the owner shall be adjudged a greater amount of damages upon appeal, than was awarded him by the sheriff's jury, the costs of such appeal are to be paid by such owner. The costs of the first assessment are, in all cases, to be paid by the company. All damages to the owners of real estate in a county, are to be assessed by the freeholders thus appointed, and the corporation may, at any time after their appointment, upon the refusal of any owner to grant the right of way, by giving him five day's notice thereof, in writing, have the damages assessed in the manner above stated.

There can be no doubt, but that it was the intention of the legislature, by this law, to give an appeal to either party, in the ordinary and usual acceptation of that term, and that upon such appeal, the cause was to be heard upon its merits, and not upon exceptions taken to the action of the sheriff or jury, or the competency of either to act in the premises. The appeal, it will be observed, is from the assessment, and in the district court the inquiry is, whether the owner shall be adjudged, or is entitled to, a greater

amount of damages than was awarded him by the sheriff's Nothing is said about an examination into the regularity of the sheriff's proceedings, nor about an inquiry into his competency to select the commissioners. When the case gets properly into the district court, it is there for trial on . its merits, and for no other purpose. For this purpose, it is immaterial whether the sheriff selecting the commissioners was, or was not, the agent of the corporation; or whether the jury had, or had not, expressed opinions adverse to the rights of the owner. In the district court, he is entitled to a trial de novo, by a jury properly selected, and impartial. The law gives him, in that tribunal, an opportunity to redress the wrong and injury inflicted by the verdict from which he appeals. If this remedy is not plain, speedy and and adequate, and none other is afforded him, he may by writ of certiorari, bring the alleged illegal proceedings for review before the district court, and have the errors of which he complains there corrected. He cannot do this, however, upon appeal, except as a trial or hearing upon the merits, may give to him the damages to which he claims to be entitled.

It is claimed, however, that the sheriff's jury had no right or power to proceed with the assessments, and that the district court had no jurisdiction of the cause. This claim is based upon the position, that there is nothing to show that the owner had refused to grant the right of way through his premises, and that until he did so refuse, the sheriff had no power to have the damages assessed by a jury. The appellee relies upon Dyckman v. The Mayor, &c., 1 Selden, 484, and White v. Conover, 5 Blackf., 462, to sustain this The last case does no more than assert the general rule, that when statutory powers are conferred upon an inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed out must be substantially pursued, or the acts and judgments of the courts are coram non judice and void, and may be attacked collaterally. The first case, in its facts, seems to be more like Vol. VIII.-48

The defendant claimed the land in disthe one before us. pute, under certain proceedings instituted by the water commissioners, appointed by virtue of an "act to provide for supplying the city of New York with pure and wholesome The title of the plaintiff, irrespective of those proceedings, was unquestioned. He claimed, however, that those proceedings were void, for the reason, among others, that until there was a disagreement between the water commissioners and the owner of the land, as to the amount of compensation, the vice-chancellor would have no jurisdiction to entertain an inquiry into the amount of damages, or as to the value of the lands. The question arose in a collateral proceeding, and it was held by both of the judges, (Foot and Gardner), in their opinions, that it did sufficiently appear that such disagreement had occurred; that such disagreement being stated in the petition of the commissioners, and sworn to, was all that was necessary, prima facie, to give the vice-chancellor jurisdiction.

Our law does not require that either the company or owner of the land, shall file a petition, or make a written complaint to the sheriff, that the owner refuses to give the right of way, or that the other refuses to give just compen. When either party makes the application, it is the duty of the sheriff to appoint the six freeholders. This application, like all other proceedings of a judicial nature, or affecting materially important interests, would be better if in writing. The form of the application, or what averments should be made, are not stated or given. It is true, beyond doubt, that the law contemplates that the owner shall have an opportunity to determine what he will take, before the determination of that question shall be left to a And we think it should sufficiently appear, that he had refused. This may appear, however, (when the question is made on appeal, for the first time in this court,) in various ways. In the New York case, it appeared from the petition addressed by the commissioners to the vice-chancellor. In this case, it appears, not from any express aver-

ment to that effect, but is abundantly shown throughout the entire proceedings.

From first to last, the records show an adversary proceeding, the contest being over the amount of damages. There is no intimation, throughout the entire record, that plaintiff had not refused to grant the right of way. He is notified that the jury are about to, and will, on a certain day, proceed to assess the damages. The jury make their report, and on the same day, he gives notice of his appeal, and files a bond. Immediately after this, he files his exceptions with the sheriff, every line of which shows he was contesting the rights of the company to take this property. for the compensation awarded by the jury. Not only so, but the freeholders are appointed by the sheriff, (as shown by the precept summoning them), to assess the damages to each tract of land, in all cases not agreed upon with the owners, and defendant's appeal is expressed in his motion, to be from the assessment of damages made and reported, and the company are notified that said matter will be heard at the next (September) term of the district court.

Under these circumstances, we conclude that it does sufficiently appear that defendant had refused to grant the right of way, and that the commissioners assessed the damages as to his land, because he had thus refused. At least, where the defendant has appeared, as in this case, in the court below, and contested the right of the company to take his land, upon the terms named and fixed by the commissioners; where it appears that he has attacked the regularity of those proceedings upon several grounds; and where it is shown that the jury were to assess the damages only in those cases in which there had been a refusal to grant the right of way, we are not prepared to say, that the whole proceedings are upon the ground urged, coram non judice, and void.

Judgment reversed.

Kilbourne v. Lockman.

KILBOURNE v. LOCKMAN.

To constitute an adverse possession, it is not essential that the possession should be in the party personally and solely, in order to enable him to plead it in an action of right, but it is sufficient if it be in him, and those through whom he derives title—they claiming title.

To any action of right, or action brought to recover real estate, commenced after the first day of July, 1856, the period of ten year's limitation is a bar.

The Code makes ten years the limitation in actions for the recovery of real estate, but where the cause of action had accrued before, section 1672 allowed the plaintiff one-half that time, or five years after the Code took effect, with the qualification (by section 1673), that he should not have more time in all than was allowed by the pre-existing law—that is, that only so much of the five years was allowed as would make the twenty years, but it could, in no case, go beyond the twenty years.

Where in an action of right, the defendant pleaded, First. An adverse possession in himself, and those under whom he claimed, for ten years prior to the commencement of the suit; and, Second, That the plaintiff had not brought his action within ten years from the time when his right of action accrued, to which pleas a demurrer was sustained; Held, That the court erred in sustaining the demurrer.

Where in action of right to recover a town lot, which formed a portion of the lands known as the "Half Breed Tract," the defendant pleaded that he held under one J. A., a genuine half-breed, who was entitled, as such, to an interest in said lands, but whose right and claim was not adjudicated in the partition suit decided in 1841, nor at any other time; to which plea a demurrer was sustained; Held, That the plea did not show where the defendant derived his title, nor why the interest of J. A. was not adjudicated, and was bad.

In an action of right, the defendant cannot set up in his answer a supposed ground of claim for the plaintiff, and plead to it himself, and put the plaintiff to the necessity of pleading to it also.

Appeal from the Lee District Court.

SATURDAY, APRIL 23.

The plaintiff sued for the possession of lot number eleven, in block number thirty-three, in the city of Keokuk, claiming title in fee. This lot is a part of the lands known as the "Half Breed Tract." The judgment was against the

Kilbourne v. Lockman.

defendant, who appeals. The material facts in the case, and the errors assigned, sufficiently appear from the opinion of the court.

Charles Mason, (with whom was E. C. Moss and Baldwin), for the appellant, cited Piatt v. Vattier, 1 McLean, 156; Bluckford v. Peltier, 1 Blackf., 36; Sturgis v. Crowninshield, 4 Wheat., 207; Ruggles v. Keeler, 3 Johns., 263.

Love, Noble & Craig, for the appellee, cited Stephens on Pleading, 341; 1 Chitty on Pleading, 224; 1 Ib., 539; 8 Ohio, 108; 22 Maine, 130; 3 Johns., 168: 4 Scam., 371; Heffner v. Walsh, 4 G. Greene, 509; Brace v. Reed, 4 Ib., 422; Johnson v. Carson, 4 Ib., 501; Barney v. Chittenden, 2 Ib., 167; Wright v. Millard, 3 Ib., 86; Kerr v. Leighton, 2 Ib., 196; Wright v. Marsh et al., 2 Ib., 94; King v. Smith, Rice, (South Car.), 11; Beadle v. Hunter, 3 Strobh., 331; 2 Smith's Lead. Cases, 493; Phares v. Walters, 6 Iowa, 106.

WOODWARD, J.—The questions in the case, arise on demurrers to the defendant's pleas or answers, and these will be noticed according to their subject matter.

The defendant's first answer, is a denial of the plaintiff's right, and he assigns as error, that judgment was rendered without a trial upon this, although the plaintiff replied, taking issue. The answer to this is, that the record entry states, that after the disposition of the demurrers, the cause was submitted to the court, who found that the defendant did detain the possession, and that the plaintiff had the right both of possession and of property.

By the third count in the answer, the defendant pleads an adverse possession in himself, and those through whom he claims, of ten years, and by the fourth, that the plaintiff has not brought his action within ten years from the time when his right of action accrued.

It is not essential, as is urged by the plaintiff, that the

possession should be in the defendant personally and solely, in order to enable him to plead it, but it is sufficient if it be in him and those through whom he derives title, they claiming title.

We are to determine whether the period of ten years, is a limitation upon the plaintiff in his action, and also whether the court can declare it to be, or not to be, such, when it does not appear at what time the plaintiff's cause of action accrued. We believe we can answer both of these questions in the affimative.

Two circumstances are to be noticed: First. That it does not yet appear in the case, when the plaintiff's cause of action accrued. Second. The action was commenced on the 22d of August, 1857. In one of the defendant's answers, in which he sets up a title for the plaintiff, and then pleads to it, he alleges that it accrued on the third of May, 1841, but this is not sufficient to rely upon, in determining the question of limitation.

To any real action, or action brought to recover real estate, commenced after the first day of July, A. D. 1856, the period of ten years limitation, is a bar. The question of the limitation of actions, under the statute called the Code. has been, and in some cases may still be, determined upon a changing scale. The Code makes ten years the limitation in this class of actions; and this is applied to causes then existing; but when the cause of action had accrued before. section 1672 allowed the plaintiff half that time, (or five years), after that law took effect, with this qualification, (section 1673), namely, that he should not have more time in all, than was allowed by the pre-existing law, or twenty years, in real actions—that is, only so much of the five years was allowed, as would make the twenty years, but it could in no case go beyond twenty. Then ten years was the limitation, but if the cause of action arose before the Code took effect, the plaintiff had five years after it, but no more.

To illustrate, we will suppose one or two cases. Suppose the action accrued on the first of May, 1834. The plaintiff

would have the five years after the Code took effect, so it did not give him more than twenty years in all. Therefore, he would have until the first of May, 1854, and not longer. Again: Suppose his cause arose on the first of May, 1844. This being before the Code, he has five years after it to commence, or till the first of July, 1856, and no more, and this is but twelve years, and a little over. In these cases, the plea of ten years limitation, or adverse possession, would not form a bar.

Different periods have been allowable in different cases, depending upon the time when the cause of action arose. The equality of the rule, in respect to past causes of action, consisted in giving them the same length of time after the Code took effect, limiting them to twenty years only. The half of the period prescribed as a limitation in the Code, (or the five years), having now elapsed, that time has no influence in the reckoning, when the action was commenced after it had passed. That period expired on the first of July, 1856, and the plaintiff has had the benefit of it to commence his action, and not having brought it within that time, the only question is, whether he has begun within ten years after his right accrued. The action was brought on the 22d of August, 1857.

From the above, it is apparent, that if he has not brought his action within ten years after the accruing of his right, he is barred. Consequently, the defendant's answer, that he did not bring his action within ten years from the accruing of the right, or that the right arose more than ten years before the commencement of the action, is a good plea in bar. And for the same reason, the plea of adverse possession for that length of time, prior to the bringing of the suit, is also a valid plea. It follows, of course, that the demurrer to these two counts in the answer, should have been overruled. See Wright v. Keithler, 7 Iowa, 92; Gillis v. Black, 5 Ib., 439; Montgomery v. Chakwick, 7 Ib., 114.

The above determination would dispose finally of the

cause, but there are one or two other points which should be noticed.

The defendant withdrew the second and seventh counts of his answer, and as a substitute for the seventh, pleaded his ninth count, which is, that he holds under one Isaac Antaya, a genuine half-breed, who was entitled, as such, to an interest in said lands, but whose right and claim was not adjudicated in the beforementioned partition suit, decided in 1841, nor at any other time. It is quite manifest to a legal mind, that there might be several adequate causes or reasons, why this interest may not have been adjudicated, consistently with the supposition of its actual existence, and according to the decision in the case of Wright v. Keithler, supra, it might be important that the relative period of the plaintiff's acquisition of title, should appear; but in this answer he sets forth none of the facts and circumstances, showing either when he derived title under Antaya, nor why the interest or claim of the latter was not heard. answer does not show that this claim was presented, nor that Antaya, or the defendant, as his grantee, was fraudulently excluded—nothing is stated as a reason why the decree should be opened, save the unexplained fact that the interest was not adjudicated. The demurrer was correctly sustained.

The fifth, sixth, and eighth counts of the answer, aver that if the plaintiff has any title, it is only one based upon. and derived from, the judgment in partition of the 8th of May, A. D. 1841, commonly known as the suit for the partition of the Half-Breed lands; and allege that the said judgment and the proceedings in the said action, were, and are null, void, and of no effect; and then the pleadings proceed respectively, to state many facts, causes and reasons, why the same are, and should be held to be, so null, void, and of no effect, among which are several averments of fraud, and fraudulent representations and practices, on the part of those who conducted and managed the cause, and those who obtained the judgment. The plaintiff demurred,

and assigned several causes, among which he objects that these answers set up matters of evidence only, not yet offered, but anticipated by the pleaders; that the defendant can not thus suppose a basis of the plaintiff's claim, and plead to it; that the court cannot, in this action, take cognizance of these matters; and that the pleadings set up the supposed invalidity of a decree, or judgment, of the district court, which he cannot thus do.

The pleas, or answers, are bad, for the reason first above In the case of Gillis v. Black, 6 Iowa, 439, it was held, that the defendant could not set up a supposed, or presumed, ground of claim for the plaintiff, and then plead to it himself, and put the plaintiff to the necessity of plead-A moment of reflection will show, that such ing to it also. a course could lead to no useful end, but only to immaterial and absurd issues. But if the party came into a position where he could either properly plead, or offer in evidence, facts rendering a judgment void for fraud, or could show it void on its face, this would present a different state of things, and a different question. The supreme court of the United States held, that if a judgment be set up in a collateral action, against a party who had not an opportunity to plead to the action in which it was recovered, it may be avoided by proof of fraud, or may be shown to be void on Webster v. Reid, 11 How., 437; 18 Curtis, 678. its face.

It is believed that these remarks cover all of the defenses and questions made in the cause. For the error before named, the judgment of the district court is reversed, and a writ of *procedendo* will issue to that court, with directions to proceed in a manner consistent with this opinion.

Judgment reversed.

Vol. VIII.-49

PLATT v. HEDGE & Co.

Instruments of writing, conveying property to creditors, to secure the payment of money advanced, are but assignments to creditors; and where they do not definitely specify the sum due, parol evidence is admissible to show the true amount of the debts.

In an action on an open account, in the name of an assignee, where the assignment is bona fide, and without recourse, and where no set-off or cross claim against the assignor is pleaded, the assignor is a competent witness to prove the account.

Where it is assigned for error that improper evidence was admitted, and it appears from the record that the evidence complained of was admitted, in connection with other testimony, which is not set out in the record' the appellate court cannot determine whether or not there was error.

Appeal from the Des Moines District Court.

SATURDAY, APRIL 23.

The firm of Platt & Bailey, dealers in hogs, pork, &c., held a large account against T. Hedge & Co., to be referred to hereafter, which they assigned in writing to B. C. Platt, the plaintiff, with the restriction, "without recourse to us."

Upon this account, B. C. Platt, as assignee, sued Hedge & Co., claiming the sum of \$28,402 65, for hogs, money, and drafts for money, for money had and received upon pork, sold by them for said Hedge & Co., and for other money had and received to their use, and on account stated.

The answer, first, denies the allegations of the petition, generally; Second. Denies the receipt of certain moneys and drafts specified in the petition, and avers that the hogs and pork received, were received on account of Hedge & Co., and were disposed of by their order, and accounted for before the said assignment, or notice of it; Third. Denies the assignment of the said account; Fourth. Avers payment for all hogs and pork, and for all moneys and drafts received; Fifth. Avers that Platt & Bailey, being indebted to divers persons in a large sum of money, namely—to de-

fendants, to C. S. Bissell, of Chicago, and to Wright & Looser, of New York, in order to secure and pay them, assigned to defendants all the hogs, pork and personal property, in possession of Schenck & Denise, on the 6th of February, 1856, and also, a drove of hogs purchased of one Foster, which are the same hogs and pork mentioned in the petition, all which was before the alleged assignment, or notice thereof.

The verdict and judgment were for the defendant. The plaintiff excepted, and appeals.

Browning & Tracy, for the appellant.

C. J. & B. J. Hall, for the appellees.

Woodward, J.—The questions made, arise upon the admission and rejection of evidence.

Upon the trial, the plaintiff sought to introduce as a witness, James Platt, one of the firm of Platt & Bailey, the assignors of the plaintiff. This firm, on the 6th of February, 1856, made a bill of sale to Hedge & Co., to the following effect, the terms of which become of some importance: It recites that, whereas P. & B. are indebted to Hedge & Co., in the sum of about twelve hundred dollars, being for the money paid on the purchase of the hogs hereinafter described; and whereas, they (P. & B.) are indebted to C. Foster in the sum of about six thousand dollars, being for money paid on the purchase of said hogs; now, for the purpose of securing to said Hedge & Co., and said Foster, the amount aforesaid, with interest, to-wit: the full amount due them, they (P. & B.) sell and deliver, &c., to Hedge & Co., the drove of hogs belonging to them, being six hundred and fifty hogs, more or less, and being at a certain place described—said Hedge & Co. to dispose of said hogs, and to pay the amounts above secured to themselves and Foster, and the balance, if any, to be paid to C. S. Bissell, of Chicago, to whom we are indebted, for money ad-

vanced on purchase of hogs, in about the sum of fourteen thousand dollars, to secure whom, after said Hedge & Co. and Foster are paid, this bill of sale is made. Signed, Platt & Bailey, by James Platt, one of said firm."

Under the same date, (6th of February, 1856), another bill of sale was made, reciting that, whereas Platt & Bailey, as partners, and James Platt, individually, are indebted to Thos. Hedge & Co., in the sum of about fifteen thousand dollars, for money advanced on purchase of hogs, and also, to C. L. Bissell, of Chicago, in the sum of about fourteen thousand dollars, for the same consideration, and also, to Wright & Looser, in the sum of about four thousand dollars, for the same consideration; now, for the purpose of securing to said creditors the said several sums, we sell and convey, &c., to said Hedge & Co., all the hogs, pork, and personal property now in the possession of Schenck & Denise, belonging to the firm of P. & B., or to James Platt -said Hedge & Co. are, out of the proceeds of said property, to pay the amount due themselves, and the balance, if any, they are to pay to said Bissell, and to Wright & Loos-This is signed, "Platt & Bailey, by James Platt, one of said firm." "James Platt."

The plaintiff offered the above named James Platt as a witness, and proposed to show by him, that the amounts expressed in the above bills of sale, or assignments, were not the true and actual amounts due; that the sums named were "nominal;" that Platt & Bailey were not indebted in the amounts there specified; and that it was the understanding, at the time the bills were executed, that the amounts expressed were merely nominal, and the true amounts were to be ascertained in the future. The defendant objected to the witness so testifying, and the objection was sustained by the court. The plaintiff excepted, and now assigns this ruling as error.

The question is, whether such evidence is admissible in relation to the instruments. We need not discuss whether the consideration of an instrument may be inquired into—

nor when parol evidence is admissible in respect to written contracts. These instruments are of such a nature, and expressed in such terms, that the rules alluded to, are not applicable. They are not simply bills of sale, as termed by counsel, but they are assignments for the payment of creditors. The property is not sold for a consideration, but placed in trust to pay debts. In such a case, the amount of indebtedness is subject to be shown, unless the instrument clearly appears to settle it definitely; and even then, we will not now say whether error might not be shown.

But further, the terms of these instruments indicate undetermined amounts, and that those expressed, are an approximation only. All of them are stated with the qualifying term, "about," prefixed. The sale is to "secure" the amounts, "to-wit: the full amounts due thereon." Out of the proceeds, Hedge & Co. "are to hold [sufficient] to pay the amount due themselves," meaning, clearly, the amount which may be found due. 'Again, one of the creditors to a large amount, is stated to be of Chicago, and another of New York, whilst the transaction takes place in Iowa, which leads to a fair presumption that they could not then state the precise amount due. Now, it appears very clearly from the terms of the papers, the nature of the transaction, and the circumstances alluded to, that the sums named, were an estimate only, or were nominal, as it is called by counsel; consequently, the amounts named are subject to evidence and explanation.

Another question is, whether J. Platt is a competent witness. Whatever balance there might be in the hands of Hedge & Co., arising from the property assigned, after the payment of the debts, would belong to Platt & Bailey, and was assigned to the plaintiff; and the object of the testimory, probably, was to get at this balance. Assuming the transfer from P. & B. to plaintiff to be bona fide and absolute, there would remain in P. & B. no interest in the demands assigned to B. C. Platt. If, however, P. & B. assigned the claims against Hedge & Co., as, and for a certain sum, and

were under obligation to make up that sum, if they fell short of it, he might have such an interest, in that contingency, as to disqualify him. But nothing of this kind appears in the case. And, again: if Hedge & Co. pleaded a set-off, or cross claims, it might become then important to the witness to reduce them, in such manner as to render him interested. But upon looking at the matter of the answer, it will be perceived that it consists wholly of a defense to the claims of P. & B., and sets up no counter claims. Under these views, it is considered as error to have rejected the witness.

The foregoing matter comes within the bill of exceptions, number two, which seems, in some measure, introductory, or necessary to the understanding of number one. The bill number one is to the effect that the defendant offered to read in evidence an account and receipt of C. L. Bissell, which were admitted against the objection of plaintiff. This was an account of C. L. Bissell against, or with, James Platt, running from January 1, 1856, when a balance of former account was brought up to April 22, on the debtor side, and consisted, mainly, of charges for acceptances and advances, to the amount of \$29,161 11; and the credit side, consisting principally of credits for drafts and hogs or pork, to the amount of \$20,350 57; and showing a balance due Bissell of \$8,-810 54. The receipt offered, is one purporting to be signed by said Bissell, dated Chicago, June 5, 1856, acknowledging the receipt of \$4,268 60 from Hedge & Co., which he agreed to refund to them in case the decision of the court directed the balance due from them, on account of hogs of Platt & Bailey, or James Platt, to be paid to others than This, the bill says, was allowed to be read, "with other evidence, but not as evidence per se." That the account was admitted, not by itself alone, but with other evidence, leads to some doubt whether it should not be permitted to remain as it is; but yet it is difficult to see how Bissell's account against James Platt, could be made pertinent in this suit. It is as if Platt & Bailey sued the defendants,

and we are unable to perceive, even in view of all the relations here shown, how the account of Bissell against J. Platt, should become a subject of inquiry in this action, between the assignee of P. & B. against Hedge & Co., and we are disposed to hold that its rejection was correct. But the case seems different in regard to the receipt offered. This purports to arise from, or to be connected with, "the account of hogs of Platt & Bailey, or of James Platt." In so far as it relates to funds derived from the property, probably the assigned property, of P. & B., it would seem to be pertinent for Hedge & Co. to show the payment made to Bissell, who was one of the creditors for whose benefit the property was assigned. And further, as it was let in, in connection with other evidence, which is not made to appear, we are unable to say there was error.

The defendant also offered a letter, dated January 11, 1856, purporting to be from James Platt to Hedge & Co., in which he speaks of being disappointed in not being able to ship hogs which they had purchased for "us," and of the inability to pay them money advanced. He requests them to continue to raise the money, as they had been doing, and all costs should be paid. The terms used in the letter are such as to render it doubtful whether he writes the letter for himself alone, or for the firm of P. & B. If it relates to the business of the firm, it seems clear that it was admissible; but if to his own merely, then it was not. It was admitted, in connection with other evidence, and this may have explained its object, and the subjects to which it referred. Thus regarded, it was properly suffered to go to the jury.

Upon the ground above mentioned, it is considered that there is error in the rendition of the said judgment, and the same is reversed, and a writ of *procedendo* will issue, with direction to proceed in a manner consistent with this opinion.

Reversed.

PLATT v. HEDGE & Co.

An assignor of an open account, in an action by the assignee, is a competent witness for the plaintiff, to prove the items of the account, where the assignment is bona fide, and the defendant denies the account, and pleads payment.

Appeal from the DesMoines District Court.

SATURDAY, APRIL 23.

JAMES PLATT, being an operator in pork and hogs, had very considerable transactions with Thos. Hedge & Co., of Burlington, Iowa. He assigned, in writing, to the plaintiff an account of claims against Hedge & Co., amounting to \$37,606 47, running from October 2d, 1855, to March 26, 1856, consisting of charges for money drafts, pork, and hogs, upon which the plaintiff brought his suit, October 9, 1857, claiming the above named sum, for money had and received of James Platt-money had and received on drafts, as the proceeds of pork sold on account of James Platt, and for hogs and pork delivered by, and for account of, the same; all of which were to the use and benefit of James Platt, the assignor, and for which they had refused to account, and also on an account stated; all which demands, claims, and accounts, had been assigned by said James to the plaintiff. The statement of accounts purports to be assigned "without recourse on me."

The answer denies all the plaintiff's allegations. It also alleges that defendants had paid and satisfied said James Platt, for all moneys advanced by him to them, before the assignment to plaintiff, and before notice thereof; and that, at the time the account was assigned to plaintiff, and before defendants were notified thereof, they paid said Platt all of said amount that was just and true, and that the same was fully satisfied. To this there was filed a replication, denying the new matter in the answer. Judgment for the defendant, from which the plaintiff appeals.

Browning & Tracy, for the appellants.

J. C. & B. J. Hall, for the appellees.

WOODWARD, J.—The bill of exceptions states that the plaintiff offered as a witness, James Platt, by whom he professed to prove that he was the assignor of the claim sued on, the assignment of the same, and that he had divested himself of all interest in it, so far as such assignment would do it, and to prove the items of the account. The defendants objected, upon the ground that the subject matter of the suit was not such as to vest such an interest, by assignment, in the assignee, as that he could sue in his own name, and use the assignor as a witness. The statute (Code, section 952), says, an open account of sums of money due on contract, may be assigned, and the assignee will have the right of action in his own name, but subject to the same defenses and set-offs as the instruments mentioned in the preceding section-that is, any defenses and set-offs, legal or equitable, against the assignee, which he may have against any assignor thereof before suit is commenced therein. By this section, an open account of sums of money, due for anything apparently ex contractu, and not ex delicto, may be assigned. The assignment transfers the entire property. The assignee may sue in his own name. Taking a simple case, unembarrassed by circumstances, what forbids the assignor being a witness? He is a competent one. a question of interest; whether he has bona fide, absolutely, But if this is not so; or if he has sold sold the demand. the claim for a certain amount, and is bound to make that amount good; or if there are set-offs; or if there are other relations arising, and collateral circumstances affecting the question, we will not undertake to determine, by anticipation, the cases which may arise. In the case at bar, none of these circumstances appear, and none of these questions The defendants plead a denial and payment, and on

Vol. VIII.-50

Digitized by Google

Edgar v. Greer.

these the assignor is a competent witness.

According to our present views, and as the case presents the witness, he was competent to testify; and, therefore, the judgment is reversed, and the cause remanded.

EDGAR v. GREER.

Section three of the act entitled "an act relating to evidence," approved January 24, 1853, adopts the rule of the commercial law, in relation to the presentment of bills and notes for payment, and repeals the rule upon that subject laid down by section 957 of the Code.

The presentment of a bill of exchange or promissory note, for payment, before the last day of grace, is premature, the instrument not being due until then.

Where two statutes upon the same subject matter conflict, the one last enacted must have precedence.

An action on a promissory note, dated June 16, 1857, payable three months after date, against the makers and indorser. The petition avers presentment to the makers and demand of payment, and protest and notice to the indorser, on the 17th of September, 1857. Demurrer to the petition, for the reason that the note was presented, protested, and notice of non-payment given, before it was due, which was sustained; Held, That the demurrer was properly sustained.

Appeal from the Mahaska District Court.

TUESDAY, JUNE 7.

TRACY and Stephenson made their note, dated June 16th, 1857, due in three months, to Greer, or order, who, on the same day, assigned the same to plaintiff. This action is brought against the makers and indorser. The petition avers that on the 17th of September, 1857, said note was presented to the makers, and payment thereof demanded, which was refused; and that the said note was then protested for non-payment, and on the same day, notice of said presentment and non-payment given to said Greer. To this petition, there was a demurrer by Greer, for the reason

Edgar v. Greer.

in substance, that the note was presented, protested, and notice of non-payment given, before it was due. This demurrer was sustained, and plaintiff appeals.

Seevers, Williams & Seevers, for the appellant.

H. C. Henderson, for the appellee.

WRIGHT, C. J.—This case involves the construction of section 957 of the Code, and section 3 of chapter 108 of the Laws of 1853. The first provides that "three days grace are allowed on bills of exchange, according to the custom of merchants, but not on any other instruments, and a demand at any time during the three days grace, will be sufficient, for the purpose of charging the indorser." The third section of the act of 1852-3 is: "Grace shall be allowed upon bills and notes, executed, or payable within this state, according to the principles of the law merchant, and notice of non-acceptance, or non-payment, or both, shall be required according to the principles of the commercial law."

In Goodpaster v. Voris et al., ante 334, it is held that the holder of a negotiable note, assigned during the three days of grace, would be protected against defenses by the maker, to the same extent as if assigned before that time. And the general rule of the commercial law, is stated by Mr. Parsons thus: "In this country, all negotiable paper payable at a time certain, is entitled to grace, which here means three days delay of payment, unless it be expressly stated and agreed that there shall be no grace; and a presentment for payment before the last day of grace, is premature, the note not being due until then." Parsons Mercantile Law, 106; Mitchell v. Degrand, 1 Mason, 176; Griffith v. Goff, 12 Johnson, 423; Miffin v. Roberts, 1 Esp. R., 262; Chitty on Bills, 402, 410, 573.

That this would be the rule in this state, since the act of 1852-3, is admitted, unless the section of the Code quoted, is still in force, as to the time of demand. The act of 1852-3 placed negotiable promissory notes, upon the same foot-

The State of lows v. Donehey.

ing as to demand and notice, as bills of exchange under the If it had stopped here, there would have been no difficulty, for then, notice at any time during the three days of grace, would have been sufficient to charge the indorser. But the language of the act further is, that "notice of nonacceptance, or non-payment, or both, shall be required according to the principles of the commercial law." One rule, or principle, of this law, as we have seen, is that a presentment for payment before the last day of grace, is premature, the note not being due until then. The conclusion follows, therefore, that the act of 1852-3, adopts the rule of the commercial law, and that that of the Code, (section 957), upon this subject, is repealed. If the last act referred to notes alone, both might stand—the Code referring alone to bills of exchange. The principles of the commercial law govern, however, since the law of 1852, and apply to both notes and bills. The two laws conflict, and because of this conflict, the last must have precedence. It is as if the last law had read, "demand and notice after the three days of grace only, according to the principles of the commercial law, will be sufficient to charge the indorser."

Judgment affirmed.

THE STATE OF IOWA V. DONEHEY.

The constitutionality of the act entitled "an act for the suppression of intemperance," approved January 22, 1855, affirmed.

When the general assembly provides that an act shall be published in certain newspapers, and take effect from such publication, and the act is published accordingly, it takes effect from the time of such publication; and where the act thus published corresponds with the original act, on file in the office of the secretary of state, it is to be deemed in force, although the act, as published in the session laws, may not correspond with it.

The sixth section of the act entitled "an act for the suppression of intemperance," approved January 22, 1855, was not repealed by the act supplementary thereto, approved January 23, 1857, and is still in force. The State of Iowa v. Donehey.

The case of Clare v. The State of Iowa, 5 Iowa, 509, commented on and explained.

Appeal from the Henry District Court.

TUESDAY, JUNE 7.

Defendant was prosecuted before the mayor of Mt. Pleasant, for selling intoxicating liquors, on the 29th of July, 1858. In the district court, he insisted, first, that the act of January 22, 1858, (known as the prohibitory liquor law), was unconstitutional; and, second, that the sixth section of that act, (the one containing the general prohibition) was repealed by the act of January 28, 1857, (Session Laws of 1857, 231). These points being ruled against him, he admitted the selling as charged, was convicted, and from that conviction, appeals to this court.

C. Ben Darwin, for the appellant.

S. A. Rice, (Attorney General), for the state.

WRIGHT, C. J.—The prohibitory act of 1855 was declared to be constitutional, by a majority of this court, in the case of Santo v. The State, 2 Iowa, 203; and this ruling has been since followed in Geebrick v. The State, 5 Iowa, 491; Sanders v. The same, 2 Iowa, 230; and Bryan v. same, 4 Iowa, 349. For this state, therefore, the question must be regarded as settled.

The act of 28th of January, 1858, as found in the office of the secretary of state, repeals the sixteenth, but as published in the volume of session laws, repeals the sixth section of the prohibitory act. The publication in the newspapers, provided for in the last section of the act, was correct, following verbatim the original law as filed in the office of the secretary. The question now is, whether, as to this defendant, and other persons charged with a violation of the prohibitory law, the sixth section is still in force, or whether it is repealed by the act of 1857.

The State of lows v. Donehey.

The constitution in force when the act of 1857 was passed, provided that "no law of the general assembly, of a public nature, should take effect until the same was published and circulated in the several counties of the state by authority." It was further provided, that "if the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state." It seems that the general assembly did deem the law of January 28th, 1857, of immediate importance, and directed that it should take effect from and after its publication in certain newspapers. From such publication, then, it was in effect, and, as we think, according to its terms, as thus published. Granting, therefore, that the public should be governed by the language of the act, as published in the session laws, rather than by the original act as found in the office of the secretary of state, yet we think the original files should be followed, where, as in this case, the newspaper publication follows the same.

It is, perhaps, inferrable from the case of Clare v. The State, 5 Iowa, 509, that in any event, the original act in the secretary's office is the ultimate proof of the law; and that however much the published acts, whether in authorized newspapers, or in pamphlet form, might differ from such original files, the public and the courts must be governed by the files, and not by the publications. It was not necessary, nor is it intended, by the writer of this opinion, at least, to go to that extent. It was not necessary, from the fact that the offense was charged to have been committed after the publication in the newspapers, and before the publication in At the time of the commission of the ofpamphlet form. fense, therefore, the only publication made was in the newspaper; and it would make no difference to him that a mistake was made in a subsequent publication. Nor is it necessary in this case, to go further than to hold, that the authorized publication in the newspapers being made, and being found to agree with the original act, we will resort to these as the better evidence of the true meaning of the law.

The State of lowa v. Moran.

What would be the rule, if no publication by newspaper had been provided for, or if both publications had differed from the original files, we need not now determine.

Judgment affirmed.

THE STATE OF IOWA v. MORAN.

Where a defendant in a criminal case before a justice of the peace, appeals from the judgment of the justice to the district court, he should give the district attorney notice of the appeal ten days before the next term of the district court; and upon his failure to do so, the appeal may properly be dismissed.

Appeal from the Linn District Court.

TUESDAY, JUNE 7.

LARCENY. Defendant was tried and convicted before a justice of the peace, in February, 1859. At the time of the rendition of the judgment, he gave notice of appeal to the district court. No notice of appeal was given to the attorney for the state. At the March term, 1859, of the district court, the district attorney moved to dismiss the appeal, for want of such notice. This motion was sustained, and from this order defendant appeals.

Preston & Thompson, for the appellant.

S. A. Rice, (Attorney General), for the state.

WRIGHT, C. J.—So far as material to the present inquiry, the act of January 28, 1857, (Laws of 1857, 303), gives a defendant, convicted of a criminal offense before a justice of the peace, the right to appeal to the district court, by pursuing the following course: First. He must give notice

The State of Iowa v. Moran.

of such appeal, at the time of the rendition of the judgment. Second. He must give notice of such appeal to the prosecuting attorney of the county, ten days before the next term of the district court. The appeal may, on motion, be dismissed for a failure to give this last notice.

The constitution of 1846, provided for the election of a prosecuting attorney in each county. The present constitution provides for a district attorney, in each judicial district. Chapter 102, Laws of 1858, 201, provides for the election of these district attorneys, presents their duties, and fixes their compensation. By the 3d section, he is required to appear for the state, and the several counties composing his district, in all matters in which the state, or any such county, may be a party or interested, in the district courts of said district.

The question made in this case is, whether the defendant should have given the district attorney notice of appeal, ten days before the term of the district court; and whether, for such failure, the appeal was properly dismissed.

The district attorneys, in the several districts, were elected in October, 1858, and entered upon the discharge of their duties on the first day of January, 1859, and after their election, and before said 1st of January, the county prosecutors were required to appear and prosecute, on the part of the state, in the district courts. Section 8, chapter 102, Laws of 1858.

Our conclusion is, that the office of county prosecutor was designed to be abolished by the new constitution; and that, since the first of January, 1859, all of the duties of that office devolved upon the district attorneys of the several districts. As the county prosecutors were entitled to notice of appeal, by the provisions of the act of January 28, 1857, so are the district attorneys. It is true, as suggested by counsel, that these attorneys are required to appear for the state, in cases pending in the district court; but this means, of course, in cases pending there in a proper, or in a manner, provided by law. County prosecutors were required to do the same thing; but they were entitled to notice, in cases

The State of lows v. Clinch.

of appeal from a justice of the peace. To hold that the officer prosecuting for the state—the only one known to the law—is not entitled to notice—that the law does not contemplate it—would certainly be anomalous. In every other case of appeal—whether from the inferior courts to the district court, or from the latter to this—the appellee or defendant in error, is entitled to notice; and we cannot believe that by changing the officer whose duty it is to prosecute for the state, it was intended to dispense with a notice expressly required.

Judgment affirmed.

THE STATE OF IOWA V. CLINCH.

To render a defendant liable under section 2709 of the Code, for lewdness, the indictment should charge that the parties were not married to each other.

Appeal from the Benton District Court.

TUESDAY, JUNE 7.

INDICTMENT FOR LEWDNESS. The indictment charges that the defendant, on the first day of August, 1858, at, &c., did lewdly and lasciviously associate and cohabit with one Elizabeth Matthews. A demurrer to the indictment, and a motion in arrest of judgment, were overruled, and judgment rendered against the defendant, from which he appeals.

- I. M. Preston, for the appellant.
- S. A. Rice, Attorney General, for the State.

STOCKTON, J.—The indictment in this case was materially defective, and the demurrer thereto should have been sustained. To render the defendant liable under section Vol. VIII.—51

Digitized by Google

Pense v. Hixon.

2709 of the Code, for lewdly and lasciviously cohabiting with the said Elizabeth Matthews, the indictment should have charged that the parties were not married to each other.

Judgment reversed.

Pense v. Hixon.

8 402 120 741 At no time during our existence as a territory, was dower changed from what it was under the organic acts of Wisconsin and Iowa, or different from what it was at common law.

Independent of a statute declaring that it might be thus extinguished, a sale on execution, or other judicial sale, under a judgment against the husband, would not bar the wife's right of dower.

Dower. The husband was seized of the lands in controversy after, and during, his marriage with plaintiff. In 1841, judgment was recovered against him, under which, in 1844, the lands were sold to the person under whom defendant claims. The husband died in 1856, and the wife never relinquished by any act of her's, her right of dower; *Held*, That the wife was entitled to dower in the premises.

Appeal from the DesMoines District Court.

Tuesday, June 7.

Plaintiff seeks to recover her dower in certain lands, as the widow of William Pense. To the defendant's answer, there was a demurrer, which was sustained, and from this order he appeals. The material facts appear in the opinion of the court.

Browning & Tracy, for the appellant.

C. Ben Darwin, for the appellee.

WRIGHT, C. J.—The only question in this case is, whether plaintiff is entitled to dower upon the following state of facts: The husband was seized of the lands in controversy after and

Pense v. Hixon.

during his marriage with plaintiff. In 1843, a judgment was recovered against him, in the Des Moines district court, under which, in 1844, the lands were sold to the person under whom defendant claims. The husband died in 1856, and the plaintiff never relinquished, by any act of hers, her right to dower.

By the act of January 25, 1839, 484, section 41, the dower of the wife in the real property of the husband, consisted in a life estate of one-third. Chapter 21 of the Laws of 1845, section 6, provides that dower shall be, and remain, as at common law. The Code, (section 1294), gave her one-third in value in fee simple, of all real estate "which has not been sold on execution, or other judicial sale, and to which the wife has made no relinquishment of her rights." This section was repealed in 1853, (Laws of 1853, ch. 61, 97), and the dower of the wife fixed as at common law. After the repeal of the law of 1839, by the acts of 1842-3, (Revised Laws of 1843), there was no statute in this Territory defining dower, until that of June 10th, 1845, above cited.

There was, therefore, no statute upon the subject, at the time of the sale by the sheriff in 1844, of the lands in which the plaintiff now claims dower. The ordinance of 1787, secured to the widow of the intestate, one-third part of the real estate for life, which was to remain in force until altered by the legislature of the district. This provision extended to the territory of Wisconsin, (Organic Law of Wisconsin, section 12; Code, 522), and was in like manner secured to the inhabitants of this territory. (Organic Laws, section 12; Code, 530). At no time during our existence as a territory, was dower changed from what it was by the ordinances cited, or different from what it was at common law.

There never has been a statute, (except the Code, section 1294), either in the territory or state, which provided that the wife should not have dower, in lands which had been sold on execution, or other judicial sale. And this section, as we have seen, was repealed by the act of ————, 1853. Thus, it is seen, that at the time of the sale by the sheriff,

Crocker v. Robertson.

and at the husband's death, the dower of the wife was onethird part of the real estate for life, or limited as at common law; and that at neither date, was there a provision that it could be extinguished by a sale under execution against the husband. Independent of a statute declaring that it might be thus extinguished, would such a sale bar dower? That it would not, we think is very clear from the authorities. 1 Gilman, 508; 1 Paige, 635; O'Ferrall v. Simplot, 4 Iowa, 381.

Judgment affirmed.

CROCKER v. ROBERTSON.

Where a mortgage contains a power of sale, constituting and appointing the mortgagee the trustee, and provides for the notice that is to be given—the place of sale—and all the steps that are to be taken in conducting the sale and making title to the purchaser, the mortgagee may sell, by giving notice in accordance with the terms of the instrument, and thus foreclose, without proceeding by civil action in the district court.

Where it is sought to enjoin the foreclosure of a mortgage, without proceeding by civil action in the district court, on the ground that the mortgage was executed to secure the payment of the purchase money of the said premises—that the covenants of the deed were broken—and that the vendor had no title to the land—the bill, in order to sustain an injunction, should allege either fraud or mistake, or show that the complainant would sustain irreparable injury, by being turned over to his legal remedy upon the covenants in the deed.

It is no ground for an injunction, to restrain the foreclosure of a mortgage without action, that the mortgage was executed to secure the unpaid purchase money of the premises, and that the mortgagee, when he conveyed the premises to the mortgagor, had no title to the land.

A mortgagor of real estate, cannot enjoin the foreclosure of a mortgage, executed to secure the unpaid purchase money of the premises, on account of defects in the title with which he was cognizant when he received the deed.

Appeal from the Polk District Court.

Tuesday, June 7.

Crocker v. Robertson.

The defendant was proceeding to foreclose a mortgage, by "notice and sale," when the plaintiffs transferred the entire proceedings to the district court, and obtained an injunction, as contemplated by section 2082 of the Code. At the next term, this injunction was, on motion of defendant, dissolved, and from this order plaintiffs appeal.

J. M. Ellwood, and Cole & Jewett, for the appellants.

J. A. Kasson & Withrow, for the appellee.

WRIGHT, C. J.—The grounds for affirming this judgment, are abundant and conclusive. We shall confine our examination to the more prominent ones, and can best present our views on these, by considering those urged by plaintiffs to the defendant's right to foreclose.

And first, and principally, it is objected that the instrument which defendant was proceeding to foreclose, is a mortgage, and not a deed of trust, and that since the taking effect of the act of February 25, 1858, it could only be foreclosed by civil action in the district court. The instrument contains a power of sale, constituting and appointing the mortgagee the trustee, and points out definitely and minutely the notice that is to be given, the place of sale, and all the steps that are to be taken in conducting the same, and making title to the purchaser. The instrument is, therefore, in this respect, precisely similar to those in the cases of Funning v. Kerr, 7 Iowa, 450, and Collins v. Hopkins, 7 Ib., 463, in both of which it was decided, that the mortgagee might sell by giving notice in accordance with the terms of the instrument, and thus foreclose, without proceeding by civil action in the district court. These cases must, therefore, be regarded as decisive of this question.

The land mortgaged, and which was about to be sold, was conveyed by defendant to Crocker, and this mortgage executed to secure the unpaid purchase money. It is objected now, that defendant had no title to the land—that the covenants of his deed are broken, and, therefore, he had no

Marion County v. Stanfield et al.

right to proceed with the foreclosure of this mortgage. To this position, it is well answered:

First. That there is no such showing in the bill, of either fraud or mistake, and no such showing that the plaintiffs would sustain an irreparable injury by being turned over to their legal remedy, upon the covenants claimed to be broken, as to justify the interference of a court of equity by injunction. Second. It is fully shown that Crocker was well aware of the actual condition of the title of which he now complains, at the time he took the deed, and that there has been no change of parties or facts since that time. Granting the alleged defects to exist, plaintiffs are in no condition to complain. At most, defendant is only proceeding, according to the plaintiff's own showing, to sell property to which they have no title. Under such circumstances, it does not readily appear how they could be prejudiced, and, least of all, sustain such irreparable injury as would entitle them to an injunction.

Judgment affirmed.

MARION COUNTY v. STANFIELD et al.

A notice of appeal from the district to the supreme court, cannot be served, and the proof thereof made by affidavit, by the party appealing.

The Code does not authorize such a mode of service of the notice of appeal.

Appeal from the Marion District Court.

Tuesday, June 7.

Action on an official bond, in which judgment was rendered against the principal and his sureties. A notice of appeal was served on the county judge, by one of the appellants, who makes affidavit to the return. The appellee

moved to dismiss the appeal, for the following reasons: 1. No notice of appeal was ever served upon the appellee, or upon the clerk of the district court; 2. The notice of appeal was served by R. S. Hanks, one of the defendants.

J. E. Neal, for the motion.

L. D. Ingersoll, contra.

Weight, C. J.—An affidavit of one of the defendants and appellants, accompanies the notice of appeal to the clerk and appellee, to the effect that he served the same by reading, &c., on a day named. It is objected, and we think properly, that such notice cannot be served, and the proof thereof made by the party appealing. Appellants do not claim that such service would be good, independent of the Code. That it is not authorized by anything found therein, is evident, as we think, from the following sections: 1732, 2428, 1974, 2493 to 2499 inclusive.

Appeal dismissed.

THE STATE OF IOWA V. WILSON.

The fact that a person called as a petit juror, on the trial of an indictment, in which the defendant is charged with stealing a horse, was a member of "an association or organized company, for the prosecution of persons generally, arrested for horse stealing," will not disqualify the juror.

Where on the trial of an indictment, in which the defendant was charged with stealing a horse, the defendant propounded to a petit juror an interrogatory as follows: "Do you belong to any association or organized company in this county, for the prosecution of persons generally, arrested for horse stealing?" which being objected to, was asked as follows: Do you belong to any association existing in this county, to prosecute this, (and other cases), on charge of horse-stealing? which was also objected to; and where the court sustained the objection, but allowed the juror to be interrogated in the following form: Are you a member of any organization existing in this county, or elsewhere, engaged in prosecuting this case; Held, 1. That the court did not err in sustaining

the objections to the interrogatories of the defendant; 2. That the shape in which the questions should be put to the juror, was a matter within the discretion of the court, and that the discretion had not been improperly exercised.

Where on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and tokens by which horse-thieves are known and recognized by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens.

Where a party moves to rule out testimony, the ground of objection to the evidence should be distinctly stated; and the fact that it was not stated, is a sufficient reason for overruling the motion.

Where on the trial of an indictment, the defendant asked the court to instruct the jury as follows: "That verbal confessions of guilt are to be received from a single witness with caution;" which the court refusto give as asked, but gave in the following shape: "That verbal confessions of guilt, uncorroborated by cirmcustances, are to be received with great caution;" and where the defendant further asked the court to intruct: "That extra-judicial confessions—that is, confessions made out of court—when testified to by but a single witness, and where the property is not traced to the possession of the accused, are not alone sufficient to convict;" which the court modified, so as to make it read as follows: "That extra-judicial confessions, when testified to by but one witness, uncorroborated by circumstances," &c.; Held, That the modifications of the court did not essentially vary the principle embodied in the instructions.

Appeal from the Des Moines District Court.

WEDNESDAY, JUNE 8.

INDICTMENT for larceny, in stealing a horse. While the jury were being impanneled, the defendant propounded to one of the jurors, the following interrogatory: Do you belong to any association, or organized company, in this county, for the prosecution of persons generally, arrested for horse stealing? which being objected to, the objection was sustained by the court. The defendant then asked the juror: Do you belong to any association existing in this county, to prosecute this (and other cases) on charge of horse stealing? To this question, the court also sustained an objection, and decided that the question might be put in this form: Are you a member of any organization existing in this county,

or elsewhere, engaged in prosecuting this case? To this ruling of the court, the defendant excepted. The defendant also asked another juror the following question: Does your mind feel as free and independent to decide as a juror in this case, as it would, if there was no excitement, or outside influences in reference to this case? The state having objected to this question, the same was sustained by the court.

On the trial, the state called one Miller as a witness, who testified, among other things, that he possessed the signs and tokens by which horse thieves are known to each other; that by means of these signs, he acquired the confidence of the defendant; and that in a conversation with him, the defendant confessed to him the larceny of the horses, for which he was then on trial. Upon cross-examination, the witness was asked to state what those signs were, which he declined to state, and the court decided that the witness might answer or not, as he pleased.

A witness called upon the part of the state, testified that the general character of Miller, for truth and veracity, was good; and upon cross-examination, stated that the only grounds he had for testifying that Miller's character was good, was that a majority of the people he had heard talk on that subject, spoke in favor of his character being good. The defendant then moved to rule out this testimony. The court overruled the motion, and allowed the evidence to go to the jury.

After the evidence was closed, the defendant asked the court to instruct the jury as follows: "That verbal confessions of guilt, are to be received from a single witness with caution, because such evidence is not in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of business facts may be confronted." This instruction the court refused to give as asked, but gave it as follows: "That verbal confessions of guilt, uncorroborated by circumstances, are to be received with great caution." The court was then further asked to instruct: "That extra-judicial confessions, that is, confessions made Vol. VIII.—52

out of court, when testified to but by one witness, and when the property is not traced to the possession of the accused, are not alone sufficient to convict," which was also refused as asked, but given by the court in the following form: "That extra-judicial confessions, when testified to by but one witness, uncorroborated by circumstances," &c.

The jury found the defendant guilty. The defendant moved in arrest of judgment, and for a new trial, which being overruled, he was sentenced to the penitentiary for two years, from which judgment he appeals.

David Rorer, for the appellant, in support of the various errors assigned, cited State v. Godfrey, Brayt., 170; The People v. Bodine, 1 Denio, 305; Commonwealth v. Eagan, 4 Gray., 18; McCarty v. The State, 26 Miss., 299; U. S. v. Hanway, 2 Wallace C. C., 139; The U. S. v. Wilson & Porter, 1 Bald. C. C., 84; 1 Greenl. Ev., 233; Rex v. Stokes, 1 Law. Reg., 435; Smith v. Bonham, 3 Summ., 438.

S. A. Rice, (Attorney General,) for the state, cited Whart. Crim. Law, (3d ed.), 852; State v. Benton, 2 Dev. & Bat, 196; Williams v. The State, 3 Kelley, 453; The People v. Horton, 3 Wend., 9; Cleave's Case, 8 Gratt., 606; Com. v. Webster, 5 Cush., 295; 1 California, 379; Code, sec. 2986; 1 Greenl. Ev., sec. 431; 1 Starkie, 182.

STOCKTON, J.—If the court had allowed the question to be asked, as propounded by the defendant, and the juror had answered, that he was a member of "an association, or organized company, for the prosecution of persons generally, arrested for horse-stealing," such fact, if shown, would not have disqualified the juror, and is not one of the causes for which a challenge for implied bias, is allowed by the statute. Code, sec. 2986.

It is claimed for defendant, however, that the answer to the question, if allowed by the court, might have determined the mind of the defendant, as to the exercise of his right of

peremptory challenge. In this latter view of the subject, we think, the shape in which the questions should be put to the juror, was a matter within the discretion of the court. In this instance, the court ruled that the witness might be asked, "whether he was a member of any organization existing in the county, or elsewhere, engaged in prosecuting the present cause." We think there was no improper exercise of the discretion of the court, and no prejudice has resulted to the defendant, from the change in the form of the question made by the court.

A witness for the prosecution, testified that he was posessed of the signs and tokens by which horse-thieves are known and recognized by each other; and that by means of such signs, he acquired the confidence of the defendant, who, in a conversation with the witness, confessed to him the larceny of the horses for which defendant was then on his trial. On cross-examination, the witness was asked by the defendant, what the signs were, and he declined to answer. The court ruled that the witness might answer or not, as he pleased, and refused to compel him to make known the said signs. In this ruling of the court, we think, there was no error.

A witness called for the state, testified that the general character of William H. Miller for truth and veracity, was good. On cross-examination, the witness stated, "that the only grounds on which he testified that Miller's character was good, was that a majority of the people he had heard speak on the subject, spoke in favor of his character being good." The defendant thereupon moved the court to rule out the testimony of the witness. The court refused the motion.

The objection to the testimony was not stated. All that appears by the record, is the motion to rule out the testimony, the refusal of the court, and the exception of the defendant. The ground of the objection should have been distinctly stated; and the fact that it was not so stated, was

a sufficient reason for overruling the motion. Danforth, Davis & Co. v. Carter and May, 1 Iowa, 552; Patterson v. Stiles, 6 Iowa, 54.

The court was asked to instruct the jury, that "verbal confessions of guilt are to be received with great caution." The court refused to give the instruction as asked, but gave the same in the following form: "Verbal confessions of guilt, uncorroborated by circumstances, are to be received with great caution." The court was further asked to instruct the jury, that "extra-judicial confessions-that is, confessions made out of court—when testified to by but one witness, and where the property is not traced to the possession of the accused, are not alone sufficient to convict." This instruction was modified by the court, in the same manner as the preceding one, so as to read: "Extra-judicial confessions, when testified to by but one witness, uncorroborated by circumstances, &c.," and in the latter form was given to the jury. The defendant excepted to the modifications made by the court, and now assigns for error the refusal of the court to give the instructions as asked by him.

We are unable to perceive that the modification made by the court, essentially varied the principle embodied in the instruction. The addition made by the court was, perhaps, rendered necessary by the circumstances of the present case, and it is not made to appear that any prejudice has resulted therefrom to the defendant.

Other errors are assigned, which it will not be necessary for us to notice in this opinion. No such error has been shown in the proceedings of the court, as to call for a reversal of the judgment.

Judgment affirmed.

The State of Iowa v. Malcolm.

THE STATE OF IOWA v. MALCOLM.

It is the intent with which the injury is inflicted, or attempted, that constitutes the offense of an assault, with intent to commit a great bodily injury; and when the intent is shown, that which would be an assault, unaccompanied with the felonious intent, will be such when thus accompanied.

Where under an indictment for an assault with intent to commit a great bodily injury, it appeared that the defendant was in a store-room, and while there, some words passed between him and one O .-- the person assaulted—that defendant slid off the counter, with a bowieknife in his right hand, and threatened O. with violence, when he was caught and held for some time; that O. run, and was soon followed by the prisoner, with the knife in his hand; that he was caught while in pursuit; that while in the house, he was not within ten feet, and when out of the house, not within fifty feet of said O.; that he did not attempt to throw the knife, but had to be held, in order to prevent his following up more closely said O.; and that he was very angry; and where the court instructed the jury as follows: 1. That if the defendant had a bowie-knife in his hand of sufficient capacity to inflict a great bodily injury upon O., and was only prevented from inflicting a great bodily injury upon him, by others, then he is guilty; 2. That if he had the intent, and means to inflict the offense charged, and was only prevented from inflicting the same, by others, the distance of defendant from O., is not material; 3. That if the jury should be of opinion, from the evidence, that defendant had the means and ability, to inflict a great bodily injury upon O., and find the defendant intended, and endeavored to inflict such injury, and would have done so, had he not been arrested and prevented by the interference of others, it will be their duty to find against the defendant; Held, That the instructions were correct.

Appeal from the Les District Court.

WEDNESDAY, JUNE 8.

THE defendant was indicted, tried, and convicted for an assault, with intent to inflict great bodily injury. The testimony tended to show, that defendant was in a store-room, and while there, some words passed between him and Owen, the person assaulted; that defendant slid off the counter, with a bowie knife in his right hand, and threatened

The State of lows v. Malcolm.

Owen with violence, when he was caught and held for some time; that Owen ron, and was soon followed by the prisoner, with said knife in his hand; that he was caught while thus in pursuit; that while in the house, he was not within ten feet, and when out of the house, not within fifty feet of said Owen; that he did not attempt to throw the knife, but had to be held, in order to prevent his following up more closely said Owen; and that he was very angry.

The court refused the following instruction, asked by the prisoner: If the defendant was not, at any time, within ten feet of William Owen, and could not have struck him with the knife at that distance, if he had attempted it, he is not guilty as charged.

At the request of the state, the court gave the following 1. If the defendant had a bowie-knife in his hand, of sufficient capacity to inflict a great bodily injury upon Owen, and was only prevented from inflicting a great bodily injury upon him by others, then he is guilty. he had the intent and means to inflict the offense charged, and was only prevented from inflicting the same by others, the distance of defendant from Owen is not material. 3. If the jury should be of opinion, from the evidence, that defendant had the means and ability to inflict a great bodily injury on Owen, and find the defendant intended and endeavored to inflict such injury, and would have done so, if he had not been arrested and prevented by the interference of others, it will be their duty to find against defendant. Motion for new trial, and in arrest, overruled, and the defendant appeals.

Rankin, Miller & Enster, for the appellants.

S. A. Rice, (Attorney General), for the state.

WRIGHT, C. J.—The case of Stephens v. Myers, 19 Eng. Com. Law, 414, clearly sustains the instructions in this case. Says Tindal, C. J.: "It is not every threat, when there is

SUPREME COURT CASES-1859.

The State of Iowa v. Malcolm.

no actual violence, that constitutes an assault; there has in all cases, be the means of carrying the threat into effect. The question I shall leave to you, will be, whether the defendant was advancing, at the time, in a threatening attitude, to strike, so that his blow would almost immediately have reached the plaintiff, if he had not been stopped; then, though he was not near enough, at the time, to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing, that, within a second or two of time, he would have reached the plaintiff, it seems to me it was an assault in law." To the same effect, are the following authorities: Morton v. Shoppee, 3 C. & P., (14 Eng. C. L., 355), where it is said, by TENTERDEN, C. J.: "If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is, in law, an assault." In State v. Davis, 1 Iredell, 125, it is held, that "an offer to strike, by one person rushing upon another, will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strikes in "Where," says Gaston, J., in the same case, self-defense. "an unequivocal purpose of violence is accompanied by an act, which, if not stopped, or diverted, will be followed by personal injury, the execution of the purpose is then begun -the battery is attempted." And see Roscoe's Cr. Ev., 287; Wharton's Cr. L., 544-5; 2 Greenl. Ev., secs. 82-3; 3 Ib., 59.

It is suggested that to constitute an assault, with the felonious intent, as charged in this case, there must be an actual, as contra-distinguished from what counsel call a constructive assault. We understand, however, that the intent with which the injury is inflicted, or attempted, is what constitutes the offense. This is the gist of the offense, and must be proved. If this is sufficiently shown, that which would be an assault, unaccompanied with the felonious intent, will be such when thus accompanied.

Cotes & Davis v. Shorey.

We are referred to the case of Bradley v. The State, 10 S. & M., 618, as being very similar to the one at bar. The only testimony in that case, was, "that of one witness, which showed that defendant was seen, with a knife in his hand, in pursuit of the slave alleged to have been assaulted, when he was stopped by the witness, and that he there made threats against the life of the slave." It did not appear, however, that there was any ability to do present harm—a question of fact, which, in this case, was left to the jury, and with their finding, in this respect, we see no good reason for interfering.

Judgment affirmed.



. .:

Cotes & Davis v. Shorey.

To entitle a party to a mechanic's lien, under section 981 of the Code, it is not sufficient to show that he furnished the materials, without proof to establish the further fact, that it was upon a contract, that they were furnished especially, or for the purpose of being used for or about a building.

In such a case, the contract need not be in writing, nor need it be proved by direct and positive testimony, but the jury should be satisfied that such agreement existed, and that the materials were delivered, or furnished, pursuant to it.

The law contemplates a contract or agreement more specific, than the mere purchase of the materials in the ordinary course of trade, and that the parties shall mutually understand that they are to be used, and are furnished to be used, about the erection or reparation of a building.

Where the materials are sold to the vendee, and he obtains them for the purpose of erecting a house, or other building, and where this is the mutual understanding, or agreement of the parties, the vendor will be entitled to a lien, although the particular house was not understood or mentioned.

The words "especially for any building," in section 981 of the Code, means materials furnished for building or repairing purposes, as contradistinguished from a furnishing for general, or unknown purposes, rather than that the material shall be furnished especially for any particular building.

Where in an action for a mechanic's lien, the plaintiff asked the court to

Cotes & Davies v. Shorey.

instruct the jury as follows: "That if the jury believe from the evidence, that the plaintiffs sold the materials charged in the account, for the purpose of erecting a house, though the particular house was not then winderstood by the parties; and if the jury also believe that said materials, or any part thereof, were used by the defendant in erecting the house described in plaintiff's petition, the jury will find for the plaintiffs, and establish their lien as prayed, for such amount of said materials as the jury believe were so used in the construction of said building; and the purpose for which the said materials were sold, may be proved by circumstances, from which such purpose may be inferred, or by an express contract to that effect," which instruction the court refused to give, and gave an instruction containing substantially the converse of said proposition; Held, That the court erred in refusing to give the one, and in giving the other instruction.

Appeal from the Scott District Court.

WEDNESDAY, JUNE 8.

PLAINTIFFS sue for materials furnished in the erection of a certain house, and ask a mechanic's lien. As to the amount due, there is no controversy. The questions in the case, arise upon the instructions given and refused as to the right of the plaintiffs to the lien, for which, see the opinion.

Cook, Lindley & Clark, for the appellants.

Leake & Shorey, for the appellee.

WRIGHT, C. J.—This case involves the construction of section 981 of the Code, which provides that "every person who by virtue of a contract with the owner of a piece of land, performs work, or furnishes material, especially for any building, and which material is used in the erection, or reparation thereof, has a lien, &c." Defendant claims that the material in this case, was furnished to him upon his personal responsibility, and not upon any contract, that it was especially for the building named in the petition. The law of the case upon this subject, as held by the court below, is sufficiently shown by reference to the following instructions Vol. VIII.—53

Digitized by Google

Cotes & Davies v. Shorey.

—the first, asked by the plaintiffs and refused, and the second, given by the court upon its own motion:

First. "If the jury believe, from the evidence, that the plaintiffs sold the materials charged in the account of the plaintiffs to the defendant, for the purpose of erecting a house with the same, though the particular house was not then understood by the parties; and if the jury also believe, that said materials, or any part thereof, were used by the defendant in erecting the house described in the plaintiff's petition, the jury will find for the plaintiffs, and establish their lien, as prayed, for such amount of said materials as the jury believe were so used in the construction of said building; and the purpose for which the said materials were sold, may be proved by circumstances, from which such purpose may be inferred, or by an express contract to that effect."

Second. "In order to entitle the plaintiffs to a mechanic's lien, it must appear that they sold, and the defendant purchased, the lumber, or some of it, with the mutual agreement or understanding, at the time, that the same was purchased to be used in the construction of this building; that the same, or some portion of it, was used for that purpose; and that the defendant had some interest in the lot on which the building was erected."

Our opinion is, that in giving the one, and refusing the other instruction, there was error. If the lumber was furnished from time to time, and charged in account, as the merchant or shopman charges his goods, and there was no contract, agreement, or understanding, that it was to be used in the erection or reparation of a building, plaintiffs would not be entitled to a lien. To entitle the party furnishing the materials, to a lien, it is not sufficient for him to show that he sold or delivered the defendant lumber, without proof to establish the further fact, that it was upon a contract that it was furnished specially, or for the purpose of being used for or about a building. This contract need not be in writing, nor need it be proved by direct and positive testimony. But the jury should be satisfied that such an

Cotes & Davies v. Shorey.

agreement existed, and that the lumber was delivered, or furnished, pursuant to it.

To illustrate, by reference to the circumstances of this case: Plaintiffs are engaged in keeping a lumber yard. Defendant carries on a machine shop, and in the prosecution of his business, uses lumber for making patterns, and other Now, if defendant ordered lumber from time to time, or took it from the yard, without anything being said as to the purposes for which it was to be used—if it was delivered to him in the ordinary course of trade—the plaintiff would not be entitled to a lien, though the lumber may have been used in the erection of the building. The law contemplates a contract or agreement, more specific and special in terms, with reference to the proposed use of the lumber, and that the parties shall mutually understand, that it is to be used, and is furnished to be used, about the erection or reparation of a building.

If it was sold, however, to the defendant, and he got it for the purpose of erecting a house—if this was the mutual understanding or agreement of the parties-plaintiffs would have a lien, though there was no contract that it was furnished for this house, (the one named in the petition) though the particular house was not at the time understood, referred to, or mentioned. If the defendant purchased, and the plaintiffs sold him, lumber for the purpose of building a house, and no particular lot or tract of land designated, whereon it was to be located, and the lumber was used in a house afterwards erected by the defendant, the plaintiff's right to a lien would be as perfect as if it had been furnished to repair a house especially and definitely pointed out and named. When the Code speaks of material furnished especially for any building, it means for building or repairing purposes, as contradistinguished from a furnishing for general or unknown purposes, rather than that it shall be furnished especially for any particular house or building.

Judgment reversed.

The State of lows v. Sater.



THE STATE OF IOWA v. SATER.

An affidavit for a continuance, ou the ground of the absence of witnesses, should state their residence, the particular facts expected to be proved by them, and that the affiant knows no other witness by whom the facts can be so fully proved.

Where a party indicted for stealing a horse, filed his affidavit for a continuance, on the ground of the absence of witnesses, and after stating the
names of the witnesses, alleged that he expected to prove by said witnesses that he did not steal the horse, as charged in the indictment; that
at the time said horse was stolen, he was at another and different place;
that he expected to prove by them other facts which would establish his
innocence; and that he could not prove said facts so fully by any other
witnesses; which application was overruled; *Held*, That the continuance was properly refused.

Where a person called as a petit juror in a criminal case, being interrogated as to cause, stated that he had heard considerable in relation to the case, but had not formed an unqualified opinion as to the guilt or innocence of the defendant, from what he had heard; that he had formed an opinion as to the guilt or innocence of the defendant; that if what he had heard, and upon which he had formed his opinion, should be proved upon the trial, he had now an opinion made up; that he did not think he had any prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and testimony; and that he had no bias on his mind, which would influence his mind as a juror; and where the defendant then challenged the juror for cause, which challenge was overruled by the court; Held, That the challenge was properly disallowed.

Where it is admitted by the opposite party, that the witnesses if present, would swear to the facts stated in an affidavit for a continuance, on the ground of the absence of such witnesses, the affidavit may be read to the jury, for the purpose of proving such facts only as the absent witnesses would have been permitted to testify to, if present and examined on the trial; and the party applying for such continuance, by embodying improper and irrelevant matter in his affidavit, cannot require his adversary, in order to avoid the continuance, to admit that the witness, if present, would swear to such improper and irrelevant matter.

The party making the admission, in order to avoid the continuance, will be understood as admitting that the witness, would swear to such facts only, stated in the affidavit, as are material and proper to be given in evidence.

Where in an affidavit for a continuance, on the ground of the absence of witnesses, the affiant, after stating the facts he expected to prove by the absent witnesses, alleged that he could also prove by said witnesses, the

The State of Iowa v. Sater.

character of the prosecuting witness, as follows: "That he is a man of notorious bad character; that he is esteemed a horse-thief; that he is totally unworthy of belief; and that he is now, or has recently been, under such charge in Davis county," and the prosecution admitted that the witnesses, if present, would swear to the facts stated in the affidavit; and whereon the trial, the defendant offered to read the said affidavit to the jury, which being objected to, the court excluded so much thereof as attacked the character of the prosecuting witness; *Held*, That the court ruled correctly.

Where the nature of the case will admit of it, an assignment of error should be so explicit, as to direct the attention of the court to the particular portion of the instructions, or other proceeding in the court below, to which objection is made.

The appellate court will not wade through a mass of instructions, to hunt up errors in the record, not plainly pointed out, and but vaguely intimated by the assignment of the party.

Where it is assigned for error, as follows: "The court erred in giving the instructions asked by the prosecution, and in refusing the instructions asked by the defendant," the assignment will be disregarded.

Appeal from the Des Moines District Court.

WEDNESDAY, JUNE 8.

At the January term, 1859, of the Des Moines district court, the defendant was indicted for stealing a horse, and filed a plea of not guilty. He then filed a motion for a continuance, on the ground of the absence of witnesses, alleging in his affidavit, that he expected to prove by the said witnesses, that he did not steal said horse, as charged in the indictment; that at the time said horse was stolen, the defendant was at another and different place, and also other facts which will establish the innocence of defendant; and that he cannot prove said facts so fully by any other witnesses. The residence of the witnesses is not given in the affidavit. The court overruled the motion, and refused to grant the continuance.

A second affidavit for a continuance, was then filed, in which the defendant alleged, that he had "discovered new and material testimony for the defense; that the defendant was wholly ignorant of said testimony, and had had no

The State of Iowa v. Sater.

time or opportunity to discover the same, since the indictment was found; that the witnesses are H. W. Riggs, county judge of Davis county, Daniel Fagan, William Fagan, and John Grady, all of whom are residents of Davis county; that he expects to prove by said witnesses, that William Miller, whose name is indorsed as a witness on the indictment against the defendant, formerly resided in Davis county; that his real name is William R. Rhoads, and not William Miller; that he is here under an assumed name: that he is a man of notorious bad character; that his character for truth and veracity is bad; that he is esteemed a horse-thief; that he is totally unworthy of belief; and that he is now, or has recently been, under such . charge in Davis county. The court decided that the continuance should be granted, unless the district attorney would elect to admit that the witnesses, if present, would swear to the facts stated in the affidavit, so far as the facts were relevant. The district attorney thereupon, in open court, elected to make the necessary admission, and the court then overruled the application.

While the jury were being impanneled, a juror called into the box, being interrogated as to cause of challenge. answered that he had heard a considerable in relation to the case, but had not formed an unqualified opinion of the guilt or innocence of the defendant, from what he had so heard: that he had formed an opinion as to the guilt or innocence of the defendant; and that if what he had heard, and upon which he had formed his opinion, should be proved upon the trial, he had now an opinion made up. Upon being further interrogated, the juror stated, that he did not think he had any prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and testimony, and that there was no bias in his mind. which would influence his mind as a juror. The defendant challenged the juror for cause, which was overruled, and the juror admitted.

The State of lowa v. Sater.

After the state had closed its evidence, the defendant offered to read to the jury, the statement contained in his second affidavit for a continuance, to which the state objected. The court ruled that all of the affidavit, except the following: "That he is a man of notorious bad character; that he is esteemed a horse-thief; that he is totally unworthy of belief; and that he is now, or has recently been, under such charge in Davis county," might be read to the jury.

The jury having returned a verdict of guilty, a motion for a new trial was overruled, and the defendant sentenced to the penitentiary for the term of three years, from which judgment he appeals, and assigns the following errors:

- 1. The court erred in not granting the continuance asked for in the first affidavit.
- 2. The court erred in refusing the continuance asked for in the second affidavit.
- 3. The court erred in overruling the challenge of the juror.
- 4. The court erred in not permitting the defendant to read to the jury, the whole of his second affidavit for a continuance.
- 5. The court erred in giving the instructions asked by the prosecution, and in refusing the instructions asked by defendant.
- 6. The court erred in overruling the motion for a new trial.

M. D. Browning, for the appellant.

S. A. Rice, (Attorney General), for the state.

STOCKTON, J.—The first motion for a continuance was properly overruled. The affidavit on which it was founded, although it states the names, does not state the residence of the absent witnesses, whose testimony was desired; nor does it state, with sufficient particularity, the facts expected to be proved by them; nor that the defendant knew of no other witness by whom such facts could be fully proved.

The State of lows v. Sater.

The second motion for a continuance was overruled, for the reason that the counsel for the state stipulated to admit, that the witnesses, if present, would swear to the facts stated in the affidavit, so far as the same were relevant. Code, sec. 1767.

The challenge to the juror, Eads, for bias, was properly disallowed by the court. It did not appear that he had formed or expressed an unqualified opinion, or belief, as to the guilt or innocence of the defendant. The juror stated he had not formed an unqualified opinion; that if what he had heard should be proved upon the trial, he had an opinion made up; but that he thought he had no prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and the testimony. State v. Hinkle, 6 Iowa, 380.

The affidavit in support of the motion for a continuance, could be read to the jury, for the purpose of proving such facts only, as the absent witness would have been permitted to testify to, if present, and examined on the trial. defendant, by embodying improper and irrelevant matter in his affidavit, could not require the prosecution to admit, in order to obviate a continuance, that the witness, if present, would swear to such improper and irrelevant matter. The state will be understood as admitting, that the witness would swear to such facts only, stated in the affidavit, as were material and proper to be given in evidence. court, therefore, properly refused to permit the defendant to read to the jury, on the trial, those portions of the affidavit in which he stated that he expected to prove by the absent witnesses, that the prosecuting witness was "a man of notorious bad character; that he was reputed a horsethief; and that he had recently been under such a charge in Davis county." The character of the witness could be impeached by general evidence only, as to his reputation for veracity, and not by proof of particular facts, nor by proof as to his general moral character. 1 Greenl. Ev., sec. 461;

Shellenberger v. Ward.

1 Stark. Ev., 182; Carter v. Cavenaugh, 1 G. Greene, 171. The fifth assignment of error is entirely too vague, and does not point out with any reasonable clearness, the objections taken by the defendant to the instructions given and refused. Where the nature of the case will admit of it, the assignment of error must be so explicit as to direct the attention of the court to the particular portion of the charge of the court objected to. It cannot be expected that the court will wade through a mass of instructions, to hunt up errors in the record, not plainly pointed out by the party, and but vaguely insinuated by his assignment.

The motion for a new trial was based upon the refusal of the court to grant a continuance, and upon the giving, and refusing to give, the instructions asked. As no new question is made not raised in the other asignments of error, the matter embraced in the sixth assignment may be considered as disposed of by what has already been said.

Judgment affirmed.

SHELLENBERGER v. WARD.

Where a motion is founded on matter outside of the record, it should be verified.

An action on a promissory note, against the maker and indorser, commenced before a justice of the peace. The indorser appeared before the justice, and moved to dismiss the action, for the reason that he resided in a different township from that in which the action was brought, which motion was not sworn to, and which was overruled. He then sued out a writ of error, and the judgment of the justice was affirmed in the district court; Held, That the motion was properly overruled.

Appeal from the Jackson District Court.

WEDNESDAY, JUNE 8.

Vol. VIII.-54

Shellenbeger v. Ward.

Ward made his note to Swigart, or bearer. Swigart assigned the note to plaintiffs, who brought their action before a justice of the peace, against the maker and indorser. Ward appeared before the justice, and moved to dismiss the action, for the reason that he resided in a different township from that in which the action was brought. This motion was overruled, and he prosecuted his writ of error to the district court. In that court, the judgment of the justice was affirmed, and Ward appeals.

- D. F. Spurr, for the appellant.
- J. W. Jenkins, for the appellee.

Wright, C. J.—If it should be conceded that the residence of Swigart, the indorser, in the township where the action was brought, would not give the justice jurisdiction over Ward, (if a resident of another township), this judgment would, nevertheless, have to be affirmed. It nowhere appears that Ward's residence was in another township. It is true, that in his motion, he states this fact, but there was no affidavit to that effect—there was no proof of it—nor does the justice return that he so found. In answer to the writ of error, he states that "the motion to dismiss, upon the ground that the court had no jurisdiction over the defendant, Ward, was overruled." For anything that appears, he may have found that both defendants reside in the township where the action was brought, and, as a necessary consequence, that the jurisdiction was unquestionable. ing the motion as a plea in abatement, the rule is very familiar, that being founded on matter outside of the record, it should have been verified. As it stands in this case, however, it is entirely unsupported by a verification or otherwise.

Judgment affirmed.

Loving v. Edes.

LOVING v. EDES.

A party who is the legal owner of real estate, attached as the property of another person, who is a non-resident, has no right to be made a party defendant to the suit, on his own motion; nor is he a proper party, in order to oust the court of jurisdiction as to the other defendant.

Appeal from the Muscatine District Court.

WEDNESDAY JUNE 8.

The plaintiffs commenced an action against Pa'ro & Nourse, and caused certain lands to be attached. Edes appeared, alleged that he was the owner of said real estate, and asked to be made a party defendant, so far as to protect his interest in said property. This motion, against plaintiff's objection, was sustained, and the said Edes made a party defendant. Judgment was rendered in favor of plaintiff for the amount claimed. It was also found that the legal title to the land attached was in Edes. From the order sustaining the motion of Edes, plaintiff appeals.

Gurley & Rogers, for the appellant.

Richman & Bro., for the appellee.

WRIGHT, C. J.—The order making Edes a party was clearly irregular. Whipple v. Cass, ante 126; Philips v. Shelton, 6 Iowa, 545. The cause of action was against Pairo & Nourse, and Edes had no legal interest in that, nor any right to contest the plaintiff's suit. Indeed, it seems that he made no defense to the action, and no question was made as to the liability of the parties sued, in manner and form, as charged in the petition. The position of Edes is, that Pairo & Nourse were non-residents, and that if they did not own the land attached, the court had no jurisdiction, and hence no power to render judgment. Granting the premises, it is difficult to perceive the correctness of the conclusion attempted to be drawn therefrom, that Edes, (claiming

The State of lows v. Freeman.

to own the land), was a proper party in order to oust the jurisdiction. It could make no kind of difference to him, as the owner of the land, whether it was or was not attached—whether plaintiffs did or did not recover, at least so far as his rights could be affected in the present action. Though the plaintiffs might recover ten times over, his title would remain the same. If he claimed that by these proceedings, and it should appear, that thereby a cloud was cast upon his title, his remedy is well defined und understood. But we know of no precedent for quieting or determining the title to real estate, in the manner attempted in this instance.

The order making Edes a party, and all subsequent proceedings founded thereon, will be set aside.

8 43 85 **35**

THE STATE OF IOWA V. FREEMAN.

In an indictment charging the defendant with knowingly and wilfully resisting an officer, in attempting to execute legal process, it is not necessary to aver that the officer, at the time, informed the defendant that he acted under the authority of a warrant; nor need the indictment set forth at length, the acts of the officer, or show that in making the arrest, he complied, in all respects, with the requisites of the statute.

In serving a writ, an officer will be presumed to have discharged his duty, and where a party, who resists the officer, relies on the fact, that he omitted to declare the authority under which he acted, it is proper matter of defense.

In an indictment for resisting an officer in the execution of legal process the time of the commission of the offense is immaterial, and need not be proved as alleged; and where the time is alleged under a videlicit, it is nugatory, and not traversable, and if repugnant to the fact, does not vitiate the indictment, but the videlicit, itself, may be rejected as surplusage.

It is only an inconsistency in the material allegations, that will vitiate an indictment; and where the defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage, and disregarded.



The State of lows v. Freeman.

Where a warrant of arrest, issued under section 2827 of the Code, dated on the 12th of May, 1858, and made returnable on the next day, was offered in evidence on the trial of an indictment for resisting an officer in the execution of legal process; *Held*, That the writ was not illegal and void.

A magistrate issuing a warrant of arrest, under section 2827 of the Code, for reasons appearing sufficient to him, may direct that the person arrested be brought before him for examination, on the day succeeding the date of the writ.

Appeal from the Johnson District Court.

WEDNESDAY, JUNE 8.

An indictment for resisting an officer in serving, and attempting to execute, legal process. The body of the indictment reads as follows:

"That heretofore, to-wit: on the 12th day of May, A. D. 1858, a certain judicial warrant of arrest, directed to any sheriff, constable, or marshal of the state, was duly awarded, and issued by George W. McCleary, a magistrate of said county of Johnson, to-wit: county judge of said county, state aforesaid, which said judicial warrant of arrest was duly delivered to Jacob Hugus, an officer of the state of Iowa aforesaid, to-wit: deputy sheriff of the county, and state aforesaid, and was of the purport and effect following, that is to say:

THE STATE OF IOWA, Sounty of Johnson,

The state of Iowa, to any sheriff, constable or marshal of the state:

Information upon oath, having been this day laid before me, by Levi Robinson, that the crime of murder has been committed, and accusing Thomas Casey, Michael Freeman, Frederick M. Irish, Henry Gray, Peter Conboy, Alfred Curtis, James Kennedy, Philip Clark, Joseph Stutsman, Charles Dow, Samuel Shelliday, John O'Neil, William Canot, Charles Brown,——— Mitchell, (whose given name is unknown, but who is a partner in business with

The State of lows v. Freeman.

Alfred Curtis), and Daniel Marshall thereof, you are therefore commanded forthwith to arrest the above named Thomas Casey, Michael Freeman, Frederick M. Irish, Henry Gray, Peter Conboy, Alfred Curtis, James Kennedy, Philip Clark, Joseph Stutsman, Charles Dow, Samuel Shelliday, John O'Neil, William Canot, Charles Brown, ——Mitchell, (whose given name is unknown, but who is a partner in business with Alfred Curtis), Daniel Marshall, and bring them before me, at the office of the county judge of Johnson county, in Iowa City, on the 13th day of May, A. D. 1858, at nine o'clock, A. M., or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at Iowa City, this 12th day of May, A. D. 1858.
G. W. McCleary,
County Judge of Johnson county, Iowa.

And the grand jury aforesaid do further present, that the said judicial warrant of arrest, being duly awarded, issued and delivered, as aforesaid, afterwards, to-wit: on the 12th day of May, A. D. 1858, at Iowa City township, county aforesaid, the said Jacob Hugus, then and there being an officer of this said state, to-wit: deputy sheriff of the county aforesaid, on attempting to execute and serve the judicial warrant aforesaid, in manner and form as he was therein commanded, in accordance with, and pursuant to the form of the statute in such case made and provided, summoned and commanded one William E. Small, one Henry B. Miller, one Andrew J. Adams, and divers other persons, whose names are to the jurors unknown, male inhabitants of the county aforesaid, to aid and assist him the said Jacob Hugus, then and there being an officer of this state as aforesaid, in the arrest of said Michael Freeman, in said warrant of arrest mentioned; and that said Michael Freeman then and there, to-wit: on the 12th day of October, A. D. 1858, at the county of Johnson, state aforesaid, knowingly and wilfully, with force and arms, did resist and op-

The State of lowa v. Freeman.

pose the said Jacob Hugus, an officer of the said state, as aforesaid, to-wit: a deputy sheriff of Johnson county, in said state, and his assistants, so summoned and commanded, as aforesaid, to-wit: William E. Small, Henry B. Miller, Andrew J. Adams, and divers other persons to the jurors unknown, acting under the authority of law, as aforesaid, in the serving and attempting to execute, said warrant of arrest; and so the jurors aforesaid, upon their oaths aforesaid, do say, that said Michael Freeman, on said 12th day of May, A. D. 1858, at Iowa' City township, county and state aforesaid, with force and arms, knowingly and wilfully, in manner and form aforesaid, did resist and oppose an officer of this state, as aforesaid, and his assistants, William E. Small, Henry B. Miller, Andrew J. Adams, and others, whose names are to the jurors unknown, being persons authorized by law, as aforesaid, in the serving and attempting to execute a legal process, to-wit: the warrant of arrest, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Towa.

To this indictment, the defendant demurred, assigning for cause thereof, among others, the following reasons:

- 1. Said indictment nowhere avers that the said officer, in attempting to execute the writ, informed the defendant, that he acted under the authority of a warrant.
- 2. The said indictment nowhere avers that the defendant resisted the officer, at the time of the alleged attempt to execute the warrant.
- 3. The said indictment is repugnant, in this, it avers that the said officers acted by virtue of a "judicial warrant," and sets out simply a warrant of arrest, issued by a magistrate.
- 4. The said indictment is uncertain as to the manner in which the defendant resisted the officer.

The demurrer was overruled, and the defendant pleaded not guilty. On the trial, the state offered in evidence the The State of Iowa v. Freeman.

warrant described in the indictment, with the return of the officer indorsed thereon, to which the defendant objected, but the same was overruled, and the evidence permitted to go to the jury. The jury returned a verdict of guilty, and thereupon a motion was filed to set aside the verdict, and grant a new trial, which being overruled, judgment was entered upon the verdict, from which the defendant appeals.

Templin & Fairall, for the appellant.

S. A. Rice, (Attorney General), for the state.

STOCKTON, J.—First. As to the demurrer to the indictment, it was not necessary, in charging the defendant with knowingly and wilfully resisting an officer, authorized by law, in attempting to execute a legal writ, to aver that the officer, at the time, informed the defendant that he acted under the authority of a warrant. In making an arrest, the officer must inform the defendant, that he acts under the authority of a warrant, and if required, must produce and show it. Code, section 2839. But it is not necessary that the indictment, should set forth, at length, the acts of the officer, or show that in making the arrest, he complied, in all respects, with the requisites of the statute. In serving the writ, he will be presumed to have discharged his duty; and if the defendant relies on the fact that he omitted to declare the authority under which he acted, it was proper matter of defense.

It is urged by defendant, in the second place, that the indictment nowhere charges that the defendant resisted the officer at the time of the alleged attempt by him to execute the warrant; and that in this respect it is uncertain and repugnant. The time of the commission of the offense, was immaterial, and need not have been proved as laid. Being alleged under a *videlicit*, it was nugatory, and not traversable; and if repugnant to the premises, did not vitiate the indictment, but the *videlicit* itself may be reject-

The State of Iowa v. Freeman.

ed as surplusage. It would be otherwise, if the precise time were the very point and gist of the cause. In such case, the time alleged by the *videlicit*, is conclusive and traversable, and shall be intended to be the true time, and no other; and if impossible, or repugnant to the premises, it will vitiate the indictment. Starkie's Crim. Pleading, 277-8.

It was immaterial in this case, whether the offense was committed on the 12th of May, or the 12th of October. It may frequently happen that an averment is faulty, because inconsistent with the fact, or repugnant to the other parts of the indictment, or is in itself insensible or absurd, without such fault being fatal. Where the defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage, and disregarded. It is only an inconsistency in the material allegations, that will vitiate an indictment.

The writ, by virtue of which the officer was attempting to arrest the defendant, is set forth in the indictment. The defendant objects that it is a simple writ, issued by the county judge, and not a "judicial warrant of arrest," as alleged. Whether the writ sufficiently answered the description given of it, is not so material, as the question, whether it was a legal writ, as required by the statute. Being satisfied that it is so, we think the objection of the defendant is not well taken. The demurrer was properly overruled.

We think there was no valid objections to the warrant of arrest being given in evidence to the jury. The fact that it was dated on the 12th, and made returnable on the 13th of May, was not such an objection as to render the writ illegal and void. The form given in the statute, (section 2827), is to be pursued substantially; but we cannot say, that the magistrate may not, for reasons appearing to him sufficent, direct that the person arrested be brought before him for examination on the day succeeding the date of the writ.

Vor. VIII.-55

Cameron v. Logan.

No sufficient reason is shown for the interference by this court, with the discretion of the district court, in overruling the motion for a new trial. The charge of the court to the jury was not excepted to, and seems to us quite as favorable to the prisoner as he had any right to demand. The verdict, we think, was authorized by the evidence.

Judgment affirmed.

CAMERON v. LOGAN.

A purchaser of real estate at a sheriff's sale, where there is no fraud, cannot resist the payment of the purchase money, upon the ground that the judgment debtor had no title, or a defective one, and, therefore, that the bid was without consideration.

Appeal from the Dubuque District Court.

Wednesday, June 8.

The plaintiffs brought a suit against one Attix, on the 4th of April, 1857, for the enforcement of a mechanic's lien, for work and labor, &c., prior to November 19, 1856, and recovered judgment July 11, 1857. The defendants brought suit against Attix, April 24, 1857, to enforce a mechanic's lien on the same property, upon notes given in settlement, January 20, 1857, and recovered judgment July 3, 1857.

An execution issued on the judgment of defendants, July 6th, and on that of plaintiffs, July 18, 1857, directing, in each instance, the sale of the property covered by the liens. The sheriff advertised the property for sale, under each execution, on the same day. It was first offered under the execution of defendants, and struck off to them for \$375, both parties bidding on it. It was then offered under the execution of plaintiffs, and both parties again bid, and the property was struck off again to defendants, for \$275. The

Cameron v. Logan.

amount of this last bid, though requested, they refused to pay, and this action is brought to collect the same.

Upon the above facts, the court below held that defendants were not liable, and rendered judgment against plaintiffs for costs, from which they appeal.

Bissell, Mills & Shiras, for the appellants.

Vandever & Friend, for the appellees.

WRIGHT, C. J.—No argument has been submitted by appellees, and we are left to conjecture the ground upon which they seek to sustain the judgment of the court below. From the argument of the appellants, we infer that it was predicated upon the ground that the previous sale to defendants under their execution, issued upon a judgment prior in date to that of plaintiffs, divested Attix of all title to the property; that nothing remained to be sold under the other execution; that the bid was without consideration and defendants were, therefore, not bound to pay it.

There was no fraud, and no pretence of fraud, on the part of plaintiffs, to induce the defendants to make the bid. On the contrary, it is evident that defendants purchased with full knowledge of all the circumstances, and full notice of the title they were acquiring. Whether so or not, it was their duty to take notice, and they cannot excuse themselves from paying the amount, nor avoid their bid, by showing that the judgment debtor had a defective title. This very question is examined and settled in *Dean* v. *Morris*, 4 G. Greene, 312. And see the authorities there cited. This determines the case, and we, therefore, need not examine the other grounds presented by appellants.

Judgment reversed.

Eno v. Hunt.

Eno v. Hunt.

After an appeal is taken to the supreme court, the opposite party is not bound to take notice of what maybe done in the cause in the district court. When a cause is pending in the appellate court, it is irregular and improper to make any move in it in the court below, without notice to the adverse party.

An action for the value of a horse, sold under an execution issued by the defendant as justice of the peace. On the trial, at the October term, 1856, the jury returned a verdict as follows: "We, the jury, find the value of the horse to be \$150 00. Judgment in favor of the plaintiff was rendered for that sum, with costs. An appeal to the supreme court was perfected in June, 1857. In September, 1857, a motion was made to amend the record of the cause, based upon an affidavit, to the effect that the jury returned the value of the horse by consent of parties; that the parties had agreed, that the liability of defendant to pay for the same, should be left to the court, as a question of law; and that the court, after full argument, had found the defendant liable, and rendered judgment accordingly. The motion was heard, but whether the defendant was present, does not appear, and amendment ordered as asked in the motion; Held, That the amendment made, was not "the correction of an evident mistake," within the meaning of section 1580 of the Code.

Appeal from the Clayton District Court.

WEDNESDAY, JUNE 8.

Plaintiff sues for the value of a horse sold under execution, issued by the defendant, as a justice of the peace. The issue being made up, and trial had, the jury returned a verdict as follows: "We, the jury, find the value of the horse to be one hundred and fifty dollars." Judgment was thereupon rendered in favor of plaintiff for that amount, with costs. This was at the October term, 1856, and this appeal was perfected in June, 1857. In September, 1857, a motion was made to amend the record, based upon an affidavit to the effect, that the jury returned the value of the horse by the consent of parties; that the parties had agreed that the liability of the defendant to pay for the same, should be left to the court, as a question of law; and that the court, after full argument, had found the defendant lia-

Eno v. Hunt.

ble, and rendered judgment accordingly. This motion was heard, but whether defendant was present, does not appear, and the amendment ordered, as asked in the motion.

W. T. Barker, for the appellant.

E. H. Williams, for the appellee.

WRIGHT, C. J.—It is very clear that the judgment was not authorized from the verdict. There was no finding in favor of either party. As far as the record discloses, the verdict practically amounted to nothing. Can the subsequent proceedings aid the plaintiff? We think not, for two reasons.

At the time the motion was made, the cause was pending in this court. It was at least irregular and improper to make any move in it, in the court below, without notice to the adverse party. After appeal, defendant was not bound to take notice of what might be done in the district court.

In the next place, the amendment made, was not "the correction of an evident mistake," within the meaning of section 1580 of the Code. The evidence of the agreement referred to in the motion and affidavit, existed only in parol, and it would be a very loose and dangerous practice to admit ex parte affidavits, in the absence of the opposite party, a year after final judgment, and after appeal, to establish an agreement of this nature. Such agreements should always be evidenced by the record, unless admitted.

Judgment reversed.

DRAIN et al v. MICKEL.

Where an assignee, under an assignment for the benefit of creditors, files a bond as required by law, and also an inventory and appraisement of the assigned property, sworn to by two disinterested persons, the county judge possesses no power or authority, under the act entitled "an act to amend chapter 62, title 13, of the Code of Iowa, and to close up assignments for the benefit of creditors," approved January 29, 1857, to remove the assignee, and appoint a new one.

The power conferred upon the county judge, by section twelve of the act in relation to assignments for the benefit of creditors, approved January 29, 1857, is to be exercised when there is likely to occur a failure of the trust, and not when there is merely an imperfect or defective performance of the duty prescribed.

An imperfector defective inventory of property, conveyed under an assignment for the benefit of creditors, cannot be treated as an absolute nullity.

Appeal from the Poweshiek District Court.

THURSDAY, JUNE 9.

This cause was submitted upon an agreed statement of facts, from which it appears, that on the 14th of November, 1857, T. J. Keinper executed to the defendant an assignment of his property, for the benefit of his creditors generally; and that the plaintiffs, having been appointed in the place of the assignee, Reuben Mickel, sued out a writ of replevin, by which they took possession of the property.

By the agreement, the following further facts appear: That the assignment was duly acknowledged and recorded; that Mickel accepted the trust, and took possession of the property, and held the same until the service of the writ sued out in this cause; that on the 28th of November, 1857, he published the notice required by section two of the act regulating assignments for the benefit of creditors, and on the 1st of December, filed with the clerk an inventory and valuation of the property assigned to him, and his bond in the proper amount, with sureties, approved by the clerk; that Mickel did not sign the inventory, nor swear to the

valuation, but this was made and sworn to by two disinterested persons, selected by himself, who were sworn to make a true and correct inventory and appraisement; that the said inventory included all the property and effects of said Kemper, which came into the hands of the assignee, but did not include the valuation of the real estate, which was returned as encumbered to its full value, or as of value unknown, and the exact amount and kind of each, and every item or article, was not set out, but was specified by general names and terms, without giving the number of yards, pairs, &c.; that in April, 1858, one Cutts, a creditor, applied to the county judge, for the appointment of suitable persons to execute the trust, for the reason that said Mickel had failed to file the inventory as required by law; that this application was ex parte, and without notice to the assignee; and that thereupon the county judge appointed the plaintiffs as such trustees, who thereupon brought this action to recover possession of the property.

It is further agreed, that if the court should be of the opinion that the county judge had authority and right, under the above facts, to appoint the plaintiffs, then judgment is to be rendered in their favor; but if the court should be of opinion that the county judge had not such right, then judgment for the return of the property is to be rendered in favor of the defendant. The opinion of the district court was in favor of the plaintiffs, and the defendant appeals.

W. Penn. Clarke, for the appellant.

From the statement in this case, the court will see that but a single question is presented for adjudication, viz: as to the right of the county judge, under the facts stated, to remove Mickel, the appellant, and appoint the appellees to execute the assignment of Kenper, in his stead. This question depends upon the minor one—whether there had been a sufficient compliance with the statute, on the part of Mickel? The district court held, that the inventory and

appraisement specified in section three of the act of 1857, must be made by the assignee himself; that the filing of the inventory and valuation was a precedent act to the filing of the bond; that the filing of the inventory and valuation, and giving bond, were plainly required as one entire act, necessary to completely qualify the assignee to perform the trust; and that the appointment of the appellees was legal and proper.

I. We think the decision of the court below, is too literal, and erroneous. No objection is taken to the sufficiency of the assignment itself. Under the assignment, the legal title to the property assigned, vested in Mickel, as well that not mentioned, as that described in the assignment. Laws of 1857, sec. 1, 430. The second section of the act then requires the assignee to give notice to the creditors. This was done. The third section provides, that the assignee "shall forthwith file with the clerk of the district court," a true and full inventory and valuation of said estate, under oath or affirmation, so far as the same has come to his knowledge, and shall then enter into bonds to said clerk. for the use of the creditors, in double the amount of the inventory and valuation, with one or more sureties, to be approved by said clerk," &c. The question is on the true construction of this language of the law. We contend that it was strictly complied with—that such an inventory and valuation as the statute requires, was filed. It is true that the inventory and valuation were made by two disinterested persons—that it was made under their oath—that it was filed by the assignee, with the clerk of the district court and that it contained all the effects of the estate, that had come to the knowledge of the assignee. But, says the court, the assignee "shall himself file, under his oath, or affirmation, an inventory and valuation," but the statute does not say so. It says that he shall file a full and true inventory and valuation of the estate, under oath or affirmation, but it nowhere specifies by whom the oath or affirmation shall be made. The court assumes that it must be the oath of

the assignee, while we can well see, that it was the intention of the legislature to leave it open, so that the valuation might be made by disinterested witnesses, as was done in The object of this provision of the law, was to manufacture evidence, as to the assets of the assigned estate, by which all parties should be bound. The assignce stands between the assignor and his creditors. equally interested in knowing the value of the assigned estate, and preserving some evidence of that value. necessary to the protection of the assignee, as to that of the assignor, or his creditors. And where, as in this case, the inventory and appraisement is made under the oath of disinterested persons, and their valuation of the property is filed with the clerk by the assignee, he accepts that valuation-makes it his own-and the statute, both in letter and spirit, is complied with.

But assuming, for the sake of the argument, that the statute contemplates that the inventory and valuation shall be made under the oath of the assignee himself, we contend that this provision is but directory—that the assignee does not derive his right from the filing of the inventory, but from the assignment itself-and that a failure on the part of the assignee, to swear to the inventory and valuation made by him, he having entered upon the trust, will not divest that right. It is difficult to lay down any general rule upon this subject, but we believe that the law resolves itself into this: that where the act prescribed by a statute, does not confer the right or power to act, but merely regulates the manner of carrying out the right or power, the provision of the statute is not inhibitory, but directory, and a failure to comply with the requisitions of the statute, will not vitiate the acts of the officer or agent. Thus, in the case of a sher-He holds an execution against A., and has levied on The statute provides the length and kind of notice he shall give, before making sale of the land. right and power to sell is derived, not from the publication of the notice, but from the judgment and execution. Vol. VIII.-56

Digitized by Google

sheriff, in fact, represents both parties—debtor and creditor. It has been held frequently, and was so held by this court, in Cavender v. Heirs of Smith, 1 Iowa, 306, that so much of the statute as regulated the manner of levying and selling, was directory to, and not inhibitory upon, the sheriff, and that the failure of the officer, in any of these particulars, would not vitiate a sale.

So, in the case at bar. The assignment vests in the as-The law gives the assignor the signee the right to act. right to select the person who shall wind up his affairs. The deed vests the property in the assignee, in trust for the The assignee represents both debtor and creditcreditors. The assignor has as much interest and right, that the assignee selected by him, shall act, as the creditors. the common benefit of all three of the parties concerned assignee, assignor, and creditors—the law prescribes that an inventory shall be filed, but neither the filing of that, nor the bond, confers any right-that must come from another source. But let us look at it in another light. that Mickel had gone on, and converted the assets into money, and that he had never filed any inventory, nor given any bond, could he, with the assets of Kemper in his pocket, coolly say to the creditors of K., "Gentlemen, I am not the assignee of Kemper; I never filed a sworn inventory, nor any bond, as the statute requires; and therefore never had any legal right to the assets of Kemper." We suppose not; and if he could not, then the requirements of the statute, as to filing an inventory, under oath, is directory, and the want of such a valuation will not divest him of his rights.

III. But if this court should be against us on both points, and hold that the provisions of the third section of the act, are inhibitory, and that the inventory and valuation filed, was insufficient, we contend, in the third place, that still the county judge had no power, under section twelve of the act, to remove Mickel, and appoint the appellees assignees of Kemper, in his stead. The statute makes no

provision for such a case as this. The twelfth section only contemplates cases where the assignee has deceased, or failed to file any inventory, &c., within twenty days, inferring from the lapse of time, that the assignee named in the conveyance, had refused, or was unwilling to act. But the case at bar shows a trustee in being, and acting. The defect, if defect there is, was not in refusing, failing, or neglecting to file, within twenty days, the inventory and valuation, but in filing a defective one. That the statute contemplates an entire vacancy in the assigneeship, by death, or a neglect to take the initiatory steps, is obvious, we think, from the provisions of the section itself. It makes no provision for notice to any parties interested, but treats the assignment as dormant, for want of an agent to put it into motion. cannot believe that such would have been the case, had the legislature contemplated a case like the present, or that the law-making power designed to oust a man from office or position, or to divest him of property, without at least giving him an opportunity to be heard. Old fashioned notions of justice, rebel against such a construction of the statute.

The defect in the proceeding of the assignee in this case, if any defect there is, is amply provided for in the statute. By section seven, the assignee is at all times subject to the order and supervision of the district court, and may be compelled to proceed in the faithful execution of the trust, as required by law. Under this section, if any of the creditors of Kemper, were dissatisfied with the inventory and valuation, on file,—if they believed it unfairly made, or that any wrong was intended—they had only to apply to the district court, and that court, on a proper showing, could have compelled the assignee to file an inventory and valuation, sworn to by himself. This remedied, no room was The proceeding was strictly regular. left for complaint. Not only this, but under section nine, the assignee could have been required to file an additional inventory. then, the filing an inventory and valuation, sworn to by

two disinterested persons, was irregular, and that irregularity could have been remedied under any other provision of the statute, as we clearly think it could, there is no doubt in our mind that the county judge exceeded the power conferred upon him by section twelve—or, rather, that he acted in a case not embraced within the power—and the decision of the district court is erroneous.

No appearance for the appellees.

Woodward, J.—The act of January 29th, 1857, (chapter 254, Statutes of 1857, 430), enacted to secure the faithful execution of assignments, for the benefit of creditors, provides that the assignee shall give notice of his appointment in a manner provided, and send a notice thereof to the creditors, and shall forthwith file, with the clerk of the district court, in the county where the assignment is recorded, a true and full inventory and valuation of the property assigned, under oath, or affirmation, so far as the same has come to his knowledge, and shall enter into bond with the clerk, for the use of the creditors, in double the amount of the inventory and valuation, with sureties approved by the clerk.

By section twelve, it is provided, that if the assignee die, before the closing of his trust, or in case the assignee fail or neglect, for the period of twenty days, after the making of any assignment, to file an inventory and give bond, as before provided, on the application of any person interested, as creditor or otherwise, the county judge shall appoint some one or more persons, to execute the trust embraced in the assignment. This is the portion of the act upon which the present questions arise.

It is desirable that an explanation should be given of the objection made to the inventory, that specific items were not given, such as the number, pairs, &c., and also in relation to the real estate; and as a copy of the inventory is made a part of the case, this can be shown. The following are examples:

Lot	of	prints,\$208 27
		silks, gloves, ribbons36 98
"	"	pants, coats and vests, 500 15
"	"	hats and caps, 63 00

Three lots in Plattsmouth, Nebraska territory, are mentioned as of numbers unknown, and of a value unknown. Lots in towns, and lands in the state of Iowa, are not valued, but are described in more or less accurate degree, and are stated to be encumbered to their full value.

The object of the act, as expressed in its title, is to amend chapter sixty-two of the Code, and to close up assignments for the benefit of creditors. And as expressed on its face, and in its provisions, we may add, that it is to secure the faithful and more prompt execution of such trusts. By section seven, the assignee is rendered subject at all times, to the order and supervision of the district court, and the latter may cause him to file reports, at any time, of the situation of the trust, and he is to file additional inventories, from time to time, of any further property which may come into his hands.

Assignments for the benefit of creditors, are voluntary on the part of the debtor. No authority can compel him; and when made, they partake of the nature of a private con-The assignee derives his authority entirely from the grantor, and the appointment carries with it an actual, and not an imaginary, nor theoretical, trust and confidence. The assignee is the choice of the debtor, in whom to entrust his property, and his relations with his creditors. Under this view of the relation, we should not expect the legislature to go further than to regulate, direct, and secure a performance of the trust. Heretofore it has fallen within the province of a court of chancery, to supply the place of a trustee, when the trust was likely to fail for the want of one. this act has transferred this authority to the courts of law, in the instance of assignments for the benefit of creditors.

It seems to us, that it is intended that this power should be brought into exercise, when there is likely to occur a

failure of the trust, and not when there is merely an imperfect or defective performance of the duty prescribed. cordingly, the statute enacts, that when the assignee dies, before the closing of his trust, or if he fails the given length of time to file the inventory and valuation, the county judge As the first of these provisions may appoint an assignee. regards a disability occurring after entering upon a discharge of the trust; so the second seems to regard a nonacceptance of the trust. It takes the failure to file an inventory, as a refusal to arcept. We do not think that a just interpretation of the act, requires so rigid a view, as to regard an imperfect, or defective inventory, as an absolute nullity. There are reasons for considering a valuation made by other and disinterested persons, as superior to one made by the assignee himself, and it affords him no greater opportunity for withholding property, than if made by him-He adopts the act of the appraisers, and thus makes it his own, and they are sworn to a true performance of the duty.

It is to be remembered, that he may make subsequent reports, at any time, and that he is under the supervision of and subject to, the orders of the district court, who may require him to report upon the condition of his trust, and may, at any time, rectify any errors—cause defects to be cared, and imperfections to be amended. Let it be further borne in mind, that the statute is not express in requiring his signature, or oath, to the inventory and valuation; and that there are not wanting similar instances of a want of explicit requirement as to who shall make an affidavit, or the like, and in which it is held that the act may be performed by others than the party concerned. It is true that the knowledge of the property assigned, belongs properly to him, but, on the other hand, the appraisement of it, better becomes disinterested persons.

In view of these considerations, although we may believe it the primary intent of the statute, that the assignee should sign and make oath to the inventory, at least, yet believing The State of lowa v. Ruhl.

that a total failure to accept or fulfil the trust, was contemplated, before the will of the assignor should be suspended, by the appointment of a new trustee, we cannot believe this to be the case of such a failure as to call for the appointment of another assignee. In substance, and intention, he has complied with the law, and if the form, or detail, is not entirely correct, it is within the power of the court to cause it to be perfected, by the return of a new inventory, or an amendment of the present one.

The district court considered the appointment by the county court as coming within the puposes and intent of the statute, inasmuch as the inventory and appraisement was not made by the assignee himself, thus regarding these as a nullity, and as if no inventory had been made. In this, we think, the court erred.

This view of the case, avoids the necessity of considering the objection, that the appointment was made ex parte, and without notice to the assignee.

The judgment of the district court is reversed, and a writ of *procedendo* is awarded, with directions to the court to award a return of the property, or, in failure thereof, that the defendant have judgment for the value thereof, according to the terms of the agreed case.

THE STATE OF IOWA v. RUHL.

A party cannot claim the privilege, as a matter of right, to recall a witness, either for the purpose of preparing a bill of exceptions, or for the purpose of impeaching the witness, or to settle the question as to what he did testify to when previously on the stand.

Where it only appears from the record, that the district court refused to allow a witness to be recalled, the appellate court is bound to presume that the discretion lodged with that tribunal over such matters of practice, was properly exercised.

The State of Iowa v. Ruhl.

- Under an indictment for enticing away an unmarried female, under the age of fifteen years, from her father, &c., without their consent, for the purpose of prostitution, the defendant cannot show that the said female before said enticing, told him that she was over fifteen years of age.
- A party is liable for a wrongful act, where there exists a criminal intent, although the act done, is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense.
- In a criminal case, it is not competent to prove what the prosecuting witness had said upon the subject matter of her testimony, except for the purpose of impeaching her; and when the evidence is offered for this purpose, the way must be prepared, by asking her the necessary questions while on the stand; nor is it competent to show what she said she had sworn to.
- The words, "or other persons having the legal charge of her person," in section 2584 of the Code, do not mean that such person shall have all the power and authority over the child possessed by the parent, or legally appointed guardian; nor do they mean the person who has the temporary charge, or a charge for a particular purpose—as a school-mistress or governess.
- If otherwise made out, the crime will be complete, if the enticing away was without the consent of a person who, with the permission of the parents, if living, was entrusted with the care, custody, charge, or control of the child, as an actual member of the family.
- Where on the trial of an idictment for enticing away an unmarried female, under the age of fifteen years, &c., the evidence tended to show that the female had resided with her uncle, O., for about seven years, as a member of his family, the court was asked to instruct as follows: "That if she was living in the family of O., as a member of his family, and had no parent or guardian in the state, and was wholly under the protection and care of said O., then she was under the control of said O. within the statute, provided she was under fifteen years of age at the time, and there by the consent of her parents, which consent may be proved by the relationship of the family, and the length of time she has been there, in the absence of other testimony," which instruction was given by the court; and where the defendant asked the court to instruct as follows: "That if the child was not under the control of father or mother, any one who'claimed to have such control, must show that he has been legally appointed the guardian for that purpose, or that said child has been apprenticed," which instruction the court refused; Held, That there was no error in giving the one, and refusing the other instruction.
- Where the parents of the female enticed away, are dead, and no guardian has been appointed, those with whom she resided as a member of the family, and who had her wholly under their care and protection, would

The State of Iowa v. Ruhl.

have "the legal charge of her person," within the meaning of section 2584 of the Code.

The word "prostitution," in section 2584 of the Code, means common, indiscriminate, illicit, intercourse, and not merely seduction, or sexual intercourse confined exclusively with one man.

Where on the trial of an indictment for enticing away an unmarried female, &c., there was testimony of a purpose on the part of defendant, "to seduce and enjoy the body of the said female, and that he had taken her away in order to have carnal intercourse with her, and did so_ enjoy her person, but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution; and where the defendant asked the court to instruct the jury as follows: "That if the defendant only intended to obtain the body of the said female, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution in the sense of the law," which instruction the court refused to give; Held, That the instruction should have been given.

Appeal from the Des Moines District Court.

THURSDAY, JUNE 9.

This was an indictment for taking and enticing away an numarried female, under the age of fifteen years, from and without the consent of the person having the legal charge of her person, for the purpose of prostitution. On the trial, the defendant offered certain testimony, which was objected to and rejected. He also asked certain instructions, which were refused, and objected to those asked and given at the request of the state. There was a verdict of guilty; motions in arrest, and for a new trial, overruled; and defendant sentenced to the penitentiary for three years. The other necessary facts are stated in the opinion of the court.

M. D. Browning and C. Ben Darwin, for the appellant, cited 1 Greenl. Ev., 583; 2 Cow. & H. Notes, 759; 1 Peters, C. C., 203; 5 Conn., 271; 8 Pick., 560; 1 Blackf., 86; 1 Monroe, 647; 7 Searg. & Rawle, 9; 2 Phill. Ev., 434; The People v. Carpenter, 8 Barb., 610; 12 Metcalf, 93.

Samuel A. Rice, (Attorney General,) for the state. Vol. VIII.—57

Digitized by Google

The State of Iowa v. Ruhl.

WRIGHT, C. J.—Several errors are assigned, and they will be briefly noticed in their order.

From the first bill of exceptions, it seems that during the examination of the defendant's witnesses, he proposed to recall the prosecuting witness, (or Matilda M. Clark, the female alleged to have been enticed away,) in order, first, to prepare a bill of exceptions; second, for the purpose of impeaching her; and, third, to settle the question as to what the did testify to, when previously upon the stand.

The defendant could not claim the privilege, as a matter of right, to recall the witness for either of these purposes. It is only shown that the court refused to have the witness recalled, and we are bound to presume that the discretion lodged with that tribunal over such matters of practice, was properly exercised.

The second bill of exceptions shows, that the defendant proposed to prove that the said Matilda had, before the alleged enticing, told him that she was over fifteen years of age, which was objected to, and the objection sustained.

The language of the section (2584) under which this indictment was found is, that "if any person take or entice away an unmarried female, under the age of fifteen years, from her father or mother, guardian, or other person having the legal charge of her person, without their consent, he shall upon conviction, &c." The object of the proposed testimony, was to show that defendant believed, or had good reason to believe, that the prosecuting witness was, at the time of taking or enticing away, over fifteen years of age. Would such proof aid the defendant, if in fact the female was under the age named? We think not. It is not like the case stated by appellant, and found in the books, of a married man, through a mistake of the person, having intercourse with a woman whom he supposed to be his wife, when she was not. In such a case there is no offense, for none was intended, either in law or morals. In the case at bar, however, if defendant enticed the female away, for the purpose of defilement or prostitution, there existed a crimiThe State of lowa v. Ruhl.

nal or wrongful intent—even though she was over the age of fifteen. The testimony offered was, therefore, irrelevant —for the only effect of it would have been, to show that he intended one wrong, and by mistake committed another. The wrongful intent to do the one act, is only transposed to the other. And though the wrong intended is not indictable, the defendant would still be liable, if the wrong done is so. Bishop's Cr. Law, secs. 247, 249, 252, 254, (note 4). In this last section, the rule is thus briefly stated: "The wrong intended, but not done, and the wrong done, but not intended, coalesce, and together constitute the same offense, not always in the same degree, as if the prisoner had intended the thing unintentionally done."

It appears from the third and fourth bills of exception, that defendant proposed to prove what the prosecuting witness had said before the alleged abduction, with reference to the treatment which she had received at her uncle's. where she was living—about her intention to leave his house -and also what she said she had sworn to before the examing court. All of this testimony was objected to, and the objection sustained. It was not competent, of course, to prove what the prosecuting witness had said upon these subjects, except for the purpose of impeaching her. this, the defendant had not prepared the way, by asking the necessary questions of her when on the stand. true, she was asked what she had sworn to, or if she did not swear to a particular thing before the examining court. was not proposed to prove, by the testimony offered, what she did swear, but what she said she had sworn to. was properly rejected.

The testimony tended to show that said Matilda had resided with her uncle for about seven years, as a member of his family. At the request of the state, the court instructed the jury: "that if she was living in the family of John Ogden, as a member of his family, and had no parent or guar. dian in the state, and was wholly under the protection and care of said Ogdon, then she was under the control of said Og-

The State of lows v. Ruhl.

den, within the statute, provided she was under fifteen years of age at the time, and there by the consent of her parents, which consent may be proved by the relationship of the family, and the length of time she has been there, in the absence of other testimony." The following instruction upon the same subject, asked by defendant, was refused: "if the child is not under the control of father or mother, any one else who claimed to have such control, must show that he has been legally appointed the guardian for that purpose, or that said child has been apprenticed."

We think there was no error in giving and refusing these instructions. One element essential to make up the offense is, that the female shall be enticed away, without the consent of the father, mother, &c. Another one, where she is not under the control of father, mother, or guardian, is, that the person not giving the consent, shall have the legal charge of her person. Or, to change the statement of the propositions, and bringing into more immediate connection the two elements stated, if those having the legal charge of the person of said female, shall consent to such taking or enticing away, for the purpose named, then the offense would not be made out. What is meant by the words, "or other person having the legal charge of her person?" They do not mean, in our opinion, that such person shall have all the power and authority over the child, possessed by the parent, or legally appointed guardian. Nor do they mean a person who has the temporary charge, or a charge for a particular purpose--as a school-mistress, or governess. erwise made out, the crime would be complete, if the taking away was without the consent of the person, who, with the permission of the parents, if living, was entrusted with the care, custody, charge or control of the child, as an actual member of the family. If she was temporarily at a relative's house, and he should consent, and the parent not, this would not excuse the person charged; though even such a case as that is said not to be clear, under the statute of 9 Geo., 4, C. 31, sec. 20, which is very similar to ours, the

The State of lows v. Ruhl.

language there being: "or any other person having the lawful care or charge of her." 3 Mod., 84; 1 East., P. C., See, also, Arch. Cr. Pl., 370; 4 Blackst., 209. If the parents are dead, and no guardian has been appointed, those with whom she resided as a member of the family, and who had her wholly under their care and protection, would have the "legal charge of her person," within the meaning of the statute. Under the age of fifteen, the child is legally incapable of giving consent; and if those enticing her away, for the purpose named in this statute, would not be liable to its penalties, (the parents being dead), unless those claiming and exercising the control over her person, were her legally appointed guardians, or held her as an apprentice, then, the most defenseless would be, so far as this offense is concerned, completely at the mercy of the base and selfish debanchee. This was not the intention of the statute.

It is recited in the bill of exceptions, that there was testimony of a purpose, on the part of defendant, "to seduce and enjoy the body of the said Matilda, and that he had taken her away, in order to have carnal intercourse with her, and did so enjoy her person; but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or purposed taking her, to any house of prostitution." Upon this state of facts, the defendant asked the following, among other instructions, upon the same point, all of which were refused: "If the defendant only intended to obtain the body of the said Matilda, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law.

We think this instruction should have been given. The question hinges upon the meaning of the word prostitution. Does that mean seduction, or sexual intercourse confined exclusively to one man? or does it mean common, indiscriminate, illicit intercourse? To determine this, we are to ascertain what is the appropriate and well authorized mean-

The State of lows v. Ruhl.

ing of the term, for in this sense the legislature is supposed to have used it. And as to this, there can, as it seems to us, be no fair room for doubt. Mr. Bouvier says that prostitution means, "the common lewdness of a woman, for gain." A prostitute, according to Webster, is a "female given to indiscriminate lewdness; a strumpet;" and prostitution is defined as "the act, or practice, of offering the body to an indiscriminate intercourse with men; common lewdness of a female." Walker's definition is, "the act of setting to sale; the life of a public strumpet."

The statute of Massachusetts, (1845, C. 216, sec. 1), punished any one who should, fraudulently and deceitfully entice, or take away an unmarried woman, for the purpose of prostitution at a house of ill-fame, assignation, or elsewhere, Under this statute, it was held that a man would not be guilty, who enticed a woman to leave her place of abode for the sole purpose of illicit intercourse with him. examination of the question, DEWEY, J., uses this language: "The offense made punishable by this statute, is something beyond that of merely procuring a female to leave her father's house, for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; she must be enticed away with the view, and for the purpose, of placing her in a house of ill-fame, place of assignation, or elsewhere, to become a prostitute in the more full and exact sense of the term; she must be placed there, for common and indiscriminate sexual intercourse with men, or, at least, she must be enticed away for the purpose of sexual intercourse by others than the party who thus enticed her; and a mere enticing away of a female for a personal sexual intercourse, will not subject the offender to the penalties of the statute. Commonwealth v. Cook, 12 Met., 93.

This case, we think, is clear and decisive, as to the point now under consideration. It is true that the statute of Massachusetts uses the words, "at a house of ill-fame, assignation, or elsewhere." But all of the circumstances of the case show, that it turned upon the meaning of the word

prostitution—for it appears that defendant did entice the female away, and lodged with her for more than a week, sleeping in the same bed. Such enticing was held to be for the purpose of seduction, and not for the purpose contemplated by the statute.

It may be remarked, however, that though the defendant may have designed alone a personal sexual intercourse, and had no purpose of making the female a prostitute, in the exact sense of that term, yet if he took her to a house of ill-fame, assignation, or other place, where she would be in the society alone of the lewd and lascivious, he might still be guilty, upon the principle that her prostitution might be regarded as almost necessarily to follow; and every person is presumed to have intended, or purposed, that which is the natural, necessary, and even probable consequence of his act.

Without referring to the facts, or quoting from the opinion, we remark that the case of *Carpenter* v. *The People*, 8 Barb., 603, fully sustains the views above expressed.

Judgment reversed.

FERRY v. PAGE.

Where the property in a promissory note is transferred during the pendency of a suit upon it, there is no legal objection to the substitution of a new plaintiff; but in such a case, the rights of the defendant remain unaffected, and his defense unabridged.

In case of the substitution of a new plaintiff, where the property in the cause of action has changed since the commencement of the suit, it is not necessary that the new plaintiff should derive his right by, through, or under the original plaintiff.

Where the plaintiff claims a certain sum as due, and prays judgment for the amount, with interest, he may take judgment for the amount claimed, with interest from the time of the commencement of the action.

Appeal from the Keokuk District Court.

THURSDAY, JUNE 9.

This action was commenced by Coates, Dykensforth & Co., against the defendants, upon a promissory note, dated the 4th of December, 1855, and payable in one year and twenty days, to S. II. Gilbert, by whom it was indorsed. The defendants answered, pleading a failure of consideration, to which there was a replication.

In the progress of the cause, namely, on 11th of November, 1857, the plaintiffs, Coates, Dykensforth & Co. made a suggestion to the court, that since the commencement of the action, they had made an assignment of their property, and with the rest, of this note, to Ferry, Clark & Williams, and moved the court that they might be substituted as plaintiffs, which was done, and the cause was continued to the next term.

At the May term, 1858, these plaintiffs, Ferry, Clark & Williams, represented to the court, that on the 10th of August, 1857, Coates, Dykensforth & Co. transferred the note to E. P. Ferry, and that he was the owner of it, and prayed that he might be made party plaintiff in their place. At the same term, the said Ferry also represented the same facts to the court, and prayed to be made plaintiff, which was done accordingly, but against the will of the defend-Thereupon the defendants moved to strike out this paper, (called the supplemental petition), of E. P. Ferry, and also demurred to it. On the filing of the before mentioned motion, (called supplemental petition), of Ferry, Clark & Williams, the defendants had pleaded that they were not the owners nor assignees of the note, but they do not appear to have objected further; and the matter does not recur after the substitution of Ferry as plaintiff.

The causes assigned for the motion above named, are 1. That Ferry had no right to interpose in a suit in which Ferry, Clark & Williams, were plaintiffs, without showing some claim from, or through them. 2. That the said supplemental petition makes an entirely new plaintiff, and one who has no claim to the subject matter of the suit through

or by Ferry, Clark & Williams. The causes assigned for the demurrer are: 1. That Ferry's petition claims more damages than were laid in the original petition. 2. That it shows no facts which authorize him to become the legal successor of Ferry, Clark & Williams in the suit. 3. That Ferry does not claim by, through, or under Ferry, Clark & Williams. The ruling of the court upon these matters, and substituting E. P. Ferry as plaintiff, together with the amount of the judgment, are the particulars upon which error is assigned.

Wm. Loughridge, for the appellant.

Sampson & Harned, for the appellee.

Woodward, J.—There is but one, and that a simple question presented, and that is, whether the court was justified in substituting E. P. Ferry as plaintiff in the action. The suit was originally brought by the indorsees of the note. Pending the action, and before plea pleaded, they assigned their property, and with it the note on which the suit is brought, for their creditors. According to the case of Allen v. Newberry, ante. 65, the action might have been permitted to continue and progress, in the name of the original plaintiffs, they being owners of the note at the commencement of the action. But, if the property in the note is transferred during the pendency of the action, there is no legal objection to the substitution of a new plaintiff. The rights of the defendant, of course, remain unaffected, and his defense unabridged.

How it come to pass, that Ferry, Clark, & Williams, were made plaintiffs, erroneously, does not appear, nor is it material. However it may be in some cases, in one like the present, the change of the plaintiff, does not change, nor in any wise affect, the cause of action. The change is formal. The former owner, (the indorsee), failing while he held the note, and assigning his property, the cause of action remains the same, in reality, whilst the question in

Vol. VIII.-58

whose name the action shall be brought is, in substance, a formal one. Other cases may, perhaps, be conceived, in which this question may become more important.

In the present cause, Ferry, Clark & Williams having been made plaintiffs, as being assignees, if it was found, from whatever cause, that this was wrong, we see no reason why Ferry alone should not be substituted. This being done, the defendants were at liberty to deny that he was the owner of the note; for, although the action might have been prosecuted in the name of the original plaintiff, yet, having undertaken to substitute another plaintiff, they were bound to show one who held the proper legal position.

There is no weight in the objection, that Ferry must show his right or title through, or by, or under, Ferry, Clark & Williams. Whichever of them is made plaintiff, he derives his right from the original plaintiffs, as assignee under them, and if the defendant denies the right, he may put it in issue. It was not necessary that Ferry should derive from, or through, Ferry, Clark & Williams. His claim of right might be in opposition to theirs, but, in this case, they assent to his right. He is then made plaintiff, subject to any defense of the defendant. The objection that a new plaintiff is made, has but little weight, at least, in a case of this nature, for the defense is in nowise changed.

The second cause of demorrer to the petition of Ferry to be made plaintiff, is, that it shows no facts which authorize him to become the successor of Ferry, Clark & Williams in the suit. The answer to this is, that he does not seek to come in as their successor, but instead of them, and as the assignee of the original plaintiffs. The court being satisfied that there was an error in substituting Ferry, Clark & Williams, corrected this by making Ferry alone the plaintiff. This, however, did not cut off the defendant's right to deny his title to the note, and therefore his right to stand as plaintiff.

The remaining error assigned is, that judgment was rendered for too great a sum. The petition claimed \$1,104 00.

Partridge v. Wilsey.

to be due, and prayed judgment for that amount, with interest and costs. Allowing a slight difference for different modes of computation, or other cause, the sum first named appears to have been the amount due when the suit was brought, to which the plaintiff was entitled; and according to the decision of this court, he might recover interest from the commencement of the action under his petition. Butcher v. Brand, 6 Iowa, 235.

As no error is found in the rendition of the judgment below, the same is affirmed.

PARTRIDGE v. WILSEY.

Where a party residing in one place, purchases goods of another, residing at a different place, though an agent at the place where the contract is made, which goods are the property of the vendor, and ready for delivery, to be forwarded by express, and paid for with a secured note, payable in six months, the contract, under section 2409 of the Code, (Statute of Frauds,) to be valid, must be evidenced by writing.

Where a cause, in which no set-off is pleaded, is tried by the court, and the evidence offered by the plaintiff is excluded, on motion of the defendant, there is no question of fact for the court to determine, and the plaintiff may properly ask and take a non-suit.

Appeal from the Lee District Court.

THURSDAY, JUNE 9.

This is an action to recover damages. The petition alleges that the defendant, on or about the first day of July, 1856, bargained for, and bought of, the plaintiff, and that he sold to him, a parcel of goods, at the price of \$206 13, payable in six months, secured by note, with good indorser, and to be delivered to the defendant in the city of Keokuk, Iowa—the said plaintiff being a merchant, doing business in the city of New York; that afterwards, the plaintiff was

Partridge v. Wilsev.

ready and willing, and tendered the said goods to the said defendant, and requested him to accept and pay for the same, as aforesaid; and that the defendant refused to accept and pay for the said goods, by reason whereof the plaintiff was put to great expense and damage, in paying charges upon and in re-selling said goods. The defendant answered, denying all the material allegations of the petition.

. The cause was tried by the court, and it appeared that about the first of June, 1857, the defendant gave a verbal order for the goods, to an agent of the plaintiff, who was then in Keokuk, the goods to be forwarded by express, and paid for by a note, with security to be approved by the attorneys of the plaintiff; that when the goods arrived at Keokuk, they were tendered to defendant, and payment requested, in accordance with the contract; that defendant refused to receive or pay for the goods; and that the same were sold at auction at a sacrifice. The defendant offered no evidence, but moved the court to exclude all the evidence of the plaintiff, for the reason that the evidence did not show that the contract for the goods, was in writing, or that any of the goods were delivered, or purchase money paid This motion was sustained by the court, and at the time. the court announced that it would have to find for the de-The plaintiff, before judgment was formally rendered, asked leave to take a non-suit, which was refused by the court, and judgment rendered against the plaintiff for costs, from which he appeals.

Hornish & Lomax, for the appellant.

Noble & Strong, for the appellee.

STOCKTON, J.—The statute provides that no evidence of any contract in relation to the sale of personal property, is competent, unless in writing, where no part of the property is delivered, and no part of the price is paid; but that this rule does not apply, where the article of personal property sold, is not, at the time of the contract, owned by the

Partridge v. Wilsey.

vendor, and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same. Code, sections 2409, 2411.

For the plaintiffs, reliance is placed upon the fact, that they were doing business in the city of New York, and that the contract was, that the goods were to be shipped by them immediately, to the defendant at Keokuk, Iowa, by express; and it is argued, that as the goods were not ready for delivery, but were to be shipped from New York, that money and labor must necessarily be expended in procuring them, and the case was consequently taken out of the statute, and parol evidence of the contract should have been received.

We have not been able to arrive at this conclusion. referring to the decisions under the seventeeth section of the English statute of frauds, (29 Charles II., ch. 3), it will be seen that where the thing contracted for, did not exist at the time of the contract, but was to be so constituted by the application of subsequent labor, and was consequently incapable of delivery, or acceptance, at the time of agreement, the contract was held not to be within this section of the statute, although the materials to be employed, did exist at the time of the contract. Thus, a contract for a chariot to be made; or for the purchase of a quantity of oak pins, to be cut out of slabs and delivered to the buyer; or for a quantity of corn, to be threshed out, was not within Towers v. Osborne, Str., 506; Groves v. Buck, the statute. 3 M. & S., 178; Clapton v. Andrews, 4 Burr., 2101; 2 Starkie on Evidence, 353; 4 Wheaton, 89, note. The statute has been held to extend, however, to the sale of things which exist in solido, at the time of the sale, although the contract were but executory, and although the goods were to be delivered subsequently, at the same, or a different, Cooper v. Elston, 7 Term Rep., 14; Newman v. Morris, 4 Har. & McHenry, 421.

If it had appeared that the goods ordered by defendant, were not owned by the plaintiffs, and not ready for delivery, because labor, skill or money must necessarily be expended, in producing or procuring them. the case would have

Partridge v. Wilsey.

been taken out of the statute, and parol evidence of the contract might have been received. The case is, however, but that of a purchase in Keokuk, of goods in New York, to be shipped to defendant, by express, in which the agreement of sale was not in writing, no part of the property delivered, and no part of the price paid. If parol evidence of the contract can be received, we do not see that it might not be quite as competent in every other case that might arise.

The remaining question is, as to the right of the plaintiffs to suffer a non-suit. Where no set-off is pleaded, it is allowed to the plaintiffs to submit to a non-suit, at any time before the jury return with their verdict. Where the trial is by the court, and not by a jury, the plaintiff may suffer a non-suit at any time before the court is ready to make its decision on the question of fact, but not afterwards. Code, sections 1803, 1804.

There was no question of fact tried by the court, in this The plaintiff offered his evidence, which was received without objection, and they rested their case. defendant offered no evidence, but moved the court to exclude all the evidence offered by the plaintiffs. was sustained by the court, and the evidence excluded; whereupon the court stated that it must find for the defendant. At this stage of the proceedings, the plaintiffs asked leave This leave was refused, of the court to take a non-suit. and judgment rendered for the defendant. We think the permission should have been granted, and the non-suit en-By the decision of the court, the plaintiff was left without any testimony after he had rested his case, upon the testimony admitted without objection. When this testimony was excluded, on defendant's motion, there was nothing for the court to try, and a non-suit should have been Where a cause is submitted upon evidence on both sides, and the court is prepared to give a decision upon the facts given in evidence, there is reason in the rule of law, that a party should not be allowed, at this stage of pro-

ceedings, to take a non-suit. He must abide the judgment of the court on the facts. But where there is no evidence submitted—where a party is left without testimony, by the decision of the court, which prima facie was sufficient to establish his case—he is entitled to take a non-suit—the judgment against him should be one of non-suit. No question of fact has been tried; and unless the party chooses to submit his cause without evidence, he has the right to submit to a non-suit, although the court may be prepared to make its decision.

Judgment reversed.



STEWART et al. v. CHADWICK et al.

- A contract or an administrator relating to the estate of the decedent, such as he had authority to make, will enure to the benefit of the heirs, after it shall be ascertained that it is not required to pay the creditors of the estate.
- A contract concerning an interest in a claim, must be treated as personalty, and pertains to the administrator of the estate; and the right or interest will descend to the heirs of the decedent.
- Where a tract of land is described in different modes by different instruments, parol evidence is admissible to show that the different descriptions embrace the same tract of land.
- Where minor heirs are parties to a petition in chancery, it is not necessary that the petition should show the ages of such minor heirs.
- The omission of an administrator to inventory a claim, or other interest of the decedent, will not operate to forfeit the right of the heirs to any portion of the estate; nor need the heirs obtain authority from the probate court, to prosecute for the recovery of an interest in the estate, which they may regard themselves as entitled to.
- Extrinsic evidence may properly be resorted to, in order to show the usage of a business, or the use and nature of certain kinds of property, viewed with reference to its application, or the interest to which it may be subservient.
- In mineral lands, the surface—the soil, as adapted to cultivation—may be separated from the mineral right, or the right to dig under the surface for ore; and it is consistent with the nature and adaptation of the property, that one should hold one of these rights, whilst another person is interested in the other.

- Where W. and C. each claimed a "claim" right in mineral land, and C. and the administrator of W., entered into an agreement, by which the said C. agreed to give to the said W's estate, one-sixth part of all mineral raised upon the land; that he would enter the land from the United States, and was to receive the surface, or soil, of said property: that if he worked the ground, he would pay to said estate one-sixth of the mineral; and that if the estate worked or discovered any mineral, it was to have the privilege to do so, without paying any part to any person; Held, 1. That C. was to hold the soil, or surface—the agricultural use of the land—and that the estate or heirs of W. held the mineral right; 2. That C., when he caused the land to be entered, held the mineral right in trust for the heirs of W.
- A trustee does not possess the right to continue to hold the trust interest in himself, unless it is so provided in the creation of the trust; and a conveyance of it to the cestus que trust, may be enforced by a court of equity.
- A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust.
- A grantor of real estate, who conveys by deed of general warranty, is a competent witness for the complainant, in an action against his grantee, to show that the grantor conveyed, by mistake, a greater interest in the land than he possessed, and to enforce the trust against the grantee. In such a case, he is called to testify against his interest.
- Evidence to impeach a witness, is not admissible, where the party has laid no foundation for the impeachment, in his examination of the witness.
- The knowledge of the interests of an estate, which an administrator obtains in the discharge of his duties, is competent to establish the fact that there was such a claim, or such a demand, belonging to or set up by the estate, though it may not be sufficient to fix its original truth or validity, and is not hearsay evidence.
- Where an agreement has been made in good faith, with the express intention of settling prior disputes, the parties cannot go behind it; and a purchaser from one of the parties, with notice of the contract, takes subject to the settlement.
- A widow has no estate, as such, in an interest in real estate held in trust by another, for her husband. Upon the death of the husband, the right descends to his heirs at law, and when they have recovered the estate, she makes her claim of dower against them.

Appeal from the Dubuque District Court.

THURSDAY, JUNE 9.

This bill in equity was filed by Joseph and Ann Wilson, children and heirs of Abraham Wilson, deceased, and minors, suing by W. G. Stewart, and Jesse P. Farley, their guardians; and William G. Stewart, with Caroline, his wife, who was the widow of the said Abraham Wilson, to enforce the conveyance of a certain interest in mineral lot number 148, in the county of Dubuque, &c.

Prior to the year 1846, Abraham Wilson died possessed of a "claim," according to the custom of the country, in a tract of land, which was afterwards known as mineral lot number 148, and was also otherwise described. 12th of October, 1846, Heman Chadwick entered into an agreement with Robert Waller, as administrator on the estate of Abraham Wilson, to the effect, that "the said Chadwick agrees to give to said Wilson's estate, one-sixth part of all mineral that may be raised on a certain piece of mineral ground, containing six acres, more or less, (describing it as bounded by adjacent owners). The said Chadwick agrees to enter said described property from the United States, and said Chadwick has to receive the surface, or soil of said property. If said Chadwick works said ground, he will pay one-sixth of mineral to Wilson's estate, as above described: or if the administrator works or discovers any mineral, the estate is to have the privilege to do so, without paying any part to any person whatsoever." The agreement concludes as follows: "This day settled as a claim formerly in dispute, but this day settled between us, said parties."

The bill alleges that Chadwick caused the land to be "entered," at the land office, by G. L. Nightengale; and on the 30th of April, 1848, took a deed of the whole to himself, without reserving the mineral right to the heirs of Wilson; and that on the 26th of June, 1850, Chadwick conveyed the entire land and interest to the defendant, Collins. It is further averred that the conveyance of the whole to Collins, without reserving the interest of Wilson's heirs, occurred through mistake, which petitioners pray may be reformed and corrected in this respect. The bill also charges

Vol. VIII.-59

that Collins had notice, and full knowledge, of the interest of the said Abraham Wilson, and of his heirs, at the time of the conveyance to him, and that he took his deed under cognizance of that interest. The petitioners then pray that the title to the mineral right in the said lot may be declared to be vested in them; that the deed from Chadwick to Collins may be reformed and modified, so as to conform to the agreement and intention of the said parties; and that the respondents be required to convey the said mineral right to the petitioners.

Collins demurred to the bill, and answered, denying notice, &c., and the cause was heard upon petition, answer, and evidence. The decree of the court was entered in favor of the complainants, from which the respondents appeal.

D. S. Wilson, for the appellant, in his argument, cited the following authorities: Towne v. Smith, 1 W. & M., 115; Hough v. Richardson, 3 Story, 659; Morgan v. Tipton, 4 McLean, 339; 8 Smedes & M., 681; Willard's Eq., 261, 297; 1 Maddock, Ch., 36, 425; Storr and others, 7 Conn., 214; McKennan v. Doughman, 1 Penn., 417; Gregory v. Griffin, 1 Barr., 212; 1 Stark. Ev., 113; 2 Ib., 305; Rummington v. Kelley, 7 Ohio, 437; 3 McLean, 82; Jugar v. Toulmin, 9 Ala., 662; Cunningham v. Fithian, 2 Gilm., 650; Gould v. Gould, 3 Story, 617; Grand Gulf R. R. Co. v. Bryan, 8 Smedes & M., 234: Ferson v. Langer, 4 Wood. & M., 148; Evans v. Spurgier, 11 Grat. 615; Norway v. Rowe, 19 Vesey; Hine v. Dodd, 2 Atk., 275; Norcoss v. Widgery, 2 Mass., 504; 4 Pick., 253; 15 Mass., 253; 8 Johns., 137.

W. T. Barker, for the appellees.

Woodward, J.—The respondent, Collins, demurred to the bill, and the causes assigned will be noticed, without a formal statement of them. That the contract with Chadwick was made by Waller, as administrator of the estate, and not by the complainants themselves, is not a controlling

objection. The minor heirs are the real parties in interest: and a contract by the administrator, relating to the estate, such as he had authority to make, would enure to their benefit, after it should be ascertained that it was not required for the creditors. We are not aware that it has been determined whether those possessory rights, termed "claims," are real or personal estate. Contracts in relation to improvements upon them have been recognised, and the interest in them has been regarded as a possessory one; and being possessory only, they could not take rank above estates for years, which go to the administrator. For this reason. a contract concerning an interest in them, must be regarded as relating to the personalty, and therefore as pertaining to the administrator. And this may become still more clearly true, when the contract is made with the administrator. The early statutes do not imply that these interests were realty. The earliest were those of Michigan and Wisconsin, extended over this territory, which had reference to a state of things existing then, primarily; and when our own first acts were passed, recognizing real estate, there was such property here, as there were sales by the United States in 1838 and 1840. Besides, all these were in anticipation of a condition of things, which was as sure to arise as that population would take possession of the land, so that it is entirely unnecessary to adopt the forced construction that these laws, in assuming the existence of real estate, recognized possessory "claims" as such. See Bowman v. Torr. 5 Iowa, 571. As personal property, then, the administrator had rights in connection with it; and as a right, or an interest, whether real or personal, it would descend to the heirs.

No difficulty exists, in reference to the description. The tract is described in different modes in the agreement and the petition, and perhaps in the deeds; but they are shown to be the same parcel. At the latter dates, the numbers took the place of other and more detailed description.

With reference to certain other causes of demurrer, we

remark, that it is not essential, under any rule of law, that the petition should show the ages of minor heirs. And the omission to inventory a claim, or other interest, does not operate to forfeit the right of the heirs, in any portion of the estate. The respondent fails to refer us to any provision of law, requiring the heirs to obtain authority from the probate court to prosecute for the recovery of an interest, which they may regard themselves as entitled to. Positions so unfounded as these, are noticed only as an indication that they have been listened to, and not because of any merit requiring attention.

There is more force in the exception, that the agreement does not bind Chadwick to convey to Waller, the administrator, or to any other person, any interest in the land mentioned. Whatever the intent of the agreement, it is not clearly manifested. It contains provisions, or expressions, tending to either one of two or three constructions: as whether the intent was to give a permanent and substantial interest to the estate, or a usufruct; or whether to give one of these to Chadwick. Extrinsic evidence is properly resorted to, in order to learn the usages of a business, or the use and nature of certain kinds of property, viewed with reference to its application, or the interest to which it may be subservient. It was so done in this case; and from the testimony, we learn, that notwithstanding the general truth of the maxim, cujus est solum ejus est ad coetum, and that he who owns the surface, also owns the centre; yet in mineral lands the surface—the soil as adapted to cultivation may be separated from the mineral right, or the right to dig under the surface for ore. We perceive that it is consistent with the nature and adaptation of the property, that one person should hold the one of these rights, whilst another person is interested in the other.

Under the above explanation of the different uses of mineral lands, we are permitted to conceive, that the contracting parties may have intended thus to divide the use or interests in the land in controversy. There had been a differ-

ence in relation to the tract; and the parties, in their contract, say in relation to it, "this day settled as a claim formerly in dispute, but this day settled between us, said parties." It presents some difficulty that the contract indicates a possible right in Chadwick to dig mineral, in providing that if he worked it, he should pay one-sixth to the estate. But, on the other hand, this rentage implies the relation of landlord-of ownership in the estate; and this idea is much strengthened by the provision, that if the administrator (or the estate), work, or discover mineral, they do it "without paying any part to any person whatsoever." This clearly indicates the superior right, and the first right of choice, whether to work the mineral or not. One other provision settles the rights of the parties. Chadwick is to enter the property from the United States, and he "has to receive the surface, or soil, of said property." The testimony before referred to, shows how the interest in the surface may be separated from the entire interest, or fee. It is clear, that Chadwick was to hold the soil, or surface, the agricultural use of the land; and the estate, or heirs of Wilson, the mineral right. This was the division made to settle the controversy in relation to the claim. question which occurs, is: what was to be the condition of Wilson's right and interest? If Chadwick held the title. he would evidently hold the mineral right, in trust for those representing Abraham Wilson. But a trustee does not possess the right to continue to hold the trust-interest in himself, unless this is so provided in the creation of the trust. A conveyance of it to the cestui que trust, may be enforced by a court of equity. This is the condition of the right between Chadwick and the heirs and administrator of Wil-Chadwick, however, has conveyed to Collins, without reserving the interest of Wilson, in terms. Yet if Collins has taken, with a knowledge of the trust, or of the interest in Wilson, he is chargeable with the trust, and stands in Chadwick's place.

The court did not err, then, in overruling the demurrer,

and we come to the next question, which is, whether Collins had the notice above named. And it is our opinion, that he had. The testimony of Chadwick is clear and definite on this point. It relates to the time of making the contract to sell to Collins. And the testimony of O'Brien confirms that of Chadwick, showing that Collins did not claim to own the entire interest in the land, but the surface only; and this very claim of the soil alone, concurs with the supposed interest of Chadwick, and which he should have sold to Collins. Again: Waller's statement that Chadwick told him that he had conveyed only the surface, coincides with Chadwick's, that he informed Collins. It is true that it was not correct—that is, that his deed did carry more; but this declaration apparently indicates his intentions, and may have expressed what he then thought he had done.

The present is a suitable occasion to advert to the objections to the testimony. The defendant will perceive that his exceptions go to the extent of saying, that the testimony of no one of four witnesses is to be received, although none of them is impeached in respect to his character, reputation, or standing. It is true that there are some incongruities; but it is to be remembered, that the witnesses testify in respect to transactions running back several years—some of them reaching even to eighteen or twenty years; and that the principal inconsistencies relate to dates, and those not of material importance in the case. On the other hand, in the important facts, the witnesses support each other-circumstances concur-and the written instruments, which do not deceive, also lend their support. Thus, for instance, the agreement between Waller and Chadwick, gives support to the testimony of those witnesses, in so far, at least, as it shows that there was a controversy concerning the claim, and that that was designed as a settlement of it. ilar remarks might be made relative to other portions of the

Again, some of the testimony, if measured by strict rules,

was not admissible, but no objection was made at the time, so that the fault of question or answer might be corrected; and besides, both parties pursued a similar course, and seem to have aimed at obtaining all the facts, rather than the strict observance of rules.

The objection to Chadwick, as arising from interest, is not well founded. In testifying for the complainants, he is acting against his interest. Having given a warranty deed to Collins, covering the entire estate in fee, his interest would lead him to support that conveyance in its full ex-His testimony in relation to the manner in which Nightengale should have obtained the description of the land, does not necessarily indicate anything worse than carelesness; and that concerning the commissioner, goes no further than to manifest vagueness and looseness of idea in reference to them and their duties. The exceptionable features of his testimony on these subjects, and in reference to the reading of the deed, are susceptible of some extenuation from the circumstance of his illness and suffering, at the time, in consequence of an injury received in the overturning of a coach. The testimony of Smith is intended to impeach Chadwick, and being objected to, is not admissible, the party having laid no foundation in his examination of the latter.

But further, suppose Chadwick did intend to convey the whole fee to Collins, and was false in saying that he had not, or did not intend to, what effect has this upon the case? If he was chargeable as with a trust, and Collins knew it, his intent to deceive either the one or the other, is of no avail in the present inquiry.

We cannot participate with counsel, in their astonishment or incredibility, as to the testimony of Leemon. He says that the signature to the agreement is his, but that he has no recollection of the transaction—not even of putting his name to it—and he remembers nothing, and knows nothing about it, except that the signature is his. This is

not remarkable. Twelve years before he testified, he put his hand, as a witness, to an instrument in a transaction in which he had no concern, and it is far from incredible that he should recollect nothing, and should know nothing about it, save that his signature is set to it.

The objection to Waller's testimony, in relation to Wilson's claim in the land—that it is hearsay, is urged without proper consideration. It is not hearsay, although his knowledge was not original and direct. He came into connection with the estate as administrator, and the knowledge he obtains of the interests of the estate, in the discharge of the duties of such a place, may be termed official, in some sense or degree, and, however obtained, is competent to establish the fact that there was such a claim, or such a demand, belonging to, or set up by the estate, though it may not be sufficient to fix its original truth and validity. We speak now of the degree, or kind of his knowledge, and not of his competency as a witness.

The disposition of the demurrer, and the above remarks upon the construction of the agreement, embrace the most important questions of the cause, but yet there are some others which demand attention.

The agreement having been made with the express intent of settling prior disputes, the defendant cannot go behind it, as in some respects he seeks to do. Those taking under Chadwick, with notice of the contract, take subject to that settlement. If Sleator and Chadwick permitted the claim to become forfeit, by non-user, they holding lease under Waller, could not set up such forfeiture against him, and obtain a new right as opposed to him, by virtue of the forfeiture. They could not derive a benefit from a forfeiture, created by their own act. But, even if this were not so, the agreement, made subsequently, shuts off that question. Whether viewed in relation to this, or any other position, Chadwick cannot controvert the interest of Wilson's heirs, nor can one holding under him, with notice.

The respondent claims the benefit of new matter set up

in his answer, and to which there is no replication. He points out no facts, the benefit of which he asks, and we are unable to perceive anything of importance, or which would aid his cause, which is not embraced in the bill, and in the answer responsive.

Neither is the cause one which should be classed as a stale demand. Regarding its age alone, we should hardly be justified in so treating it, and it is shown that the administrator repeatedly called upon Chadwick for a deed, which he as often promised; and this request was made even after his discharge, which would bring it as late as the year 1851 or 1852. This was at the request of the guardians.

Then, it is to be borne in mind, that the petitioners are still minors, and the court can see nothing to justify it in setting the cause down as one upon a stale demand. This is remarked, without considering whether a claim to real estate, or to an interest in it, as this became upon the purchase of the title, can be treated as such.

The foregoing remarks are believed to touch all the important questions made in the cause. We have arrived at the conclusion that Chadwick held an interest in the land, as trustee for Wilson and his heirs; that when Collins purchased he had knowledge of this interest; that it descended to the heirs of Wilson; that they had no occasion to go to the probate court, for leave to prosecute this right; that it was not lost, though the administrator omitted to cause it to be entered in the inventory, and returned to the probate court; and, finally, that Collins is, in equity, bound to convey this interest to the petitioners, Joseph and Ann Wil-The widow of Abraham Wilson has no estate, as such, for which she can sue at present, as in this case. The right descends upon the heirs at law, and when they have recovered, she makes her claim of dower upon them. This suit is not to settle a right to dower, but to determine the right or title between Collins on the one hand, and the estate of Wilson, represented by his heirs, on the other.

The decree of the district court is affirmed.

Vol. VIII.-60

Walker v. Clark et al.

8 474 4110 812

WALKER v. CLARK et al.

In action against partners, a service upon one member of the firm is sufficient, and it is not necessary that the return should show that it was served upon the member of the firm employed in the general management of the business.

Each member of a partnership is an agent for all the others in the firm business, and a service upon any member is sufficient.

An affidavit of a member of a partnership, stating that he had been absent, and for that reason was unable to prepare his defense, but containing no excuse as to the other partners, makes no such showing as will justify the court in setting aside a default.

Appeal from the Johnson District Court.

THURSDAY, JUNE 9.

JUDGMENT against defendants by default, from which they appeal.

J. Clark, for the appellants.

Mackay & Bradley, for the appellee. .

Wright, C. J.—It is first objected that defendants were not served with notice of the pendency of the action. The return of the sheriff shows, that the original notice was served by reading the same to Clark and Griffith, two members of the firm of Clark, Getchell & Griffith, and the record shows that the defendants were liable as partners. Such a service is good. Code, sec. 1728; Saunders v. Bent-It is not necessary that the return should ley, post. show, where the service is upon a member of a partnership, that it was made upon the member employed in the general management of the business. Where the service is upon an agent of a partnership or corporation, it should appear that he was thus employed in the general management of their business. Each member of a partnership, however, is an agent for all the others in the firm business, and service upon any one is sufficient.

Andrus v. Clark.

The second point is, that the court below erred in refusing to set aside the judgment by default, upon the showing made by defendants. There was no such abuse of the discretion lodged with the court below, over matters of this nature, as to justify our interference. No reasonable excuse is shown for having made default—no sufficient affidavit of merits filed—and no plea or answer accompanies the showing. It is true, the defendant making the affidavit, says he had been absent, and for that reason was unable to prepare his defense; but there is nothing to show but that the other defendants had ample time, opportunity, and ability to prepare it.

It is conceded by appellee, that the judgment is for more than was owing upon the notes, and he remits the same. As to such excess, the judgment below will be corrected, and in other respects affirmed—appellee paying the costs of the appeal.

Andrus v. Clark.

Where an action was commenced in December, 1857, on two promissory notes, returnable to the February term, 1858, of the district court; and where at the said February term, the cause was continued to the ensuing May term; and where at the said May term, the defendant was called. and his default entered, and the cause continued to the September term, for final judgment; and where on the day following that on which the default was entered, the defendant moved to set aside the default, which motion was supported by an affidavit, stating that defendant "did not apprehend that the cause would be upon the docket for that (the May) term; that notice was served upon him to appear at the February term; that he supposed another notice was necessary in order to get the causes before the court at that (the May) term; and that he had a good defense, stating it, which motion was overruled; and where at the September term, it was renewed under a motion for a rehearing, and at the same time the defendant asked leave to file an answer, which he exhibited to the court, which motion was overruled, and the court refused to allow the answer to be filed; Held, That there was no error in the procceding of the court.

Andrus v. Clark.

Appeal from the Pottawatamie District Court.

THURSDAY, JUNE 9.

Action on two promissory notes. The suit was commenced in December, 1857, returnable to the February term, 1858, and attachment was sued out under the act of 1853. The cause appears to have been continued at the February term, and at the May term, the defendant was called and a judgment of default entered, and the cause continued to the September term, for final judgment, under the act of 22d of March, 1858.

On the day following the default, the defendant filed a motion, supported by affidavit, asking that the default be set aside. The affidavit states that defendant "did not apprehend that the cause would be upon the docket for that (the May) term; that notice was served upon him to appear at the February term; and that he supposed another notice was necessary in order to get the cause before the court at that (the May) term." He further states that he had a good defense; that he held a receipt given by the plaintiff for a gold watch, worth over \$100, to secure one of the notes sued upon; and that he has other defenses. of the receipt referred to, is set forth, which acknowledges the receipt of the watch as security, and states that it is to be returned when the note is paid. This motion was over-At the September term it was renewed, under a motion for a rehearing of the same, and the defendant further asked leave to file an arswer, which he then had prepared, and exhibited to the court. The answer, first, denies generally all the allegations of the petition; and, second, denies the truth of the averments in the affidavit for the attachment. The court overruled the motion for a rehearing, and for leave to file the answer. This is the matter assigned as error.

Cassady & Test, for the appellant.

Frank Street, for the appellee.

The State of Iowa v. Shelleny.

Woodward, J.—There was no error in the decision of the court. The defendant had had one continuance at the February term, and he offers no adequate excuse for his default at the May term. Nor does he show a substantial defense. A part of this answer takes issue on the affidavit for attachment, which is not permissible in this action, as has been several times ruled. Sackett et al. v. Partridge et al., 4 Iowa, 416; Sample v. Griffith, 5 Iowa, 377.

The other portion of his answer is a general denial, which is contradicted by his affidavit, showing that his watch was pledged as security for one of the notes. And further, this matter would not constitute a defense, as the watch was taken as security only, and not as payment, and was to be restored when the note was paid. If not so restored, it may give him a right of action in that respect, but the matter forms no defense to the present suit.

The judgment of the district court is affirmed.

THE STATE OF IOWA v. SHELLEDY.

In a criminal case, it is sufficient cause of challenge to a petit juror, on the part of the state, that he testifies under oath, that he thought he had formed or expressed an unqualified opinion, or belief, that the defendant was guilty or not guilty, of the offense charged; and it need not appear, in order to constitute a good cause of challenge, that the opinion, or belief, formed or expressed by the juror, was in favor of the prisoner.

The question as to the propriety of recalling a petit juror, who has been challenged, and excused from the jury box, for the purpose of permitting the other party to cross-examine him, and thus disprove the challenge, is within the discretion of the district court; and that discretion will not be controlled by the supreme court, unless it be shown to have been greatly abused.

In a criminal case, it is a sufficient cause of challenge, by the state, that a petit juror had formed an unqualified opinion; and no useful purpose is obtained by allowing the juror to state whether the opinion was favorable or unfavorable to the state.

In the absence of any statutory direction, the order of challenging petit



The State of lowa v. Shelledy.

jurors, and the mode of proceeding in filling up the panel, is left to the discretion of the district court; and unless there has been gross abuse of this discretion, there is no call for the interference of the appellate court. (Wright, C. J., dissenting.)

In the absence of any rule of law upon the subject of challenging petit jurors, and filling up the panel, it is to be presumed that the district court has adopted a rule of its own, and that the same has been followed in impanneling the jury; and where this has been done, no such prejudice has resulted as to require a reversal of the judgment, unless the discretion of the court in the premises, is shown to have been greatly abused. (WRIGHT, C. J., dissenting.)

Where in a criminal case, a petit juror was challenged by the state, on the ground of implied bias, and being sworn as a witness, for the purpose of proving the challenge, stated that he had formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty of the offense charged; and where the defendant asked the juror, whether the unqualified opinion that he had formed, was favorable or unfavorable to the state—which question the court refused to permit the juror to answer, and decided that the testimony was sufficient, and allowed the challenge; Held, That there was no error in the ruling of the court.

Where two or more persons conspire together, to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in, the execution of the design.

If the unlawful act be a trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a bare trespass, it will be murder in all, although the death happened collaterally, or beyond the original design.

The common law definition of manslaughter, has not been changed by the Code of Iowa.

Where on the trial of an indictment for murder, the court instructed the jury as follows: "Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied. It differs from murder in this—that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter—provided, such unlawful act or design be not a felony, because then, the law implies the existence of malice. But if the intent goes no further than to commit a bare trespass, it will be manslaughter; Held, That the direction of the court as to what constituted manslaughter, was as favorable to the defendant, as he could in reason require to be given.

Every person is presumed to contemplate the ordinary and natural conse-

The State of lows v. Shelledy.

quences of his own acts; and declarations made at the time of the transaction, expressive of its character, motive or object, are regarded as verbal acts, indicating a present purpose and intention, and are, therefore, admissible in proof, like other material facts, as part of the res gesta.

But where the declaration and the act are inconsistent, if the act goes beyond the declaration, or contradicts it, the presumption of intention is to be gathered from the acts of the party, upon the plain and obvious principle that the party must be presumed to intend to do that which he voluntarily and wilfully does in fact do.

Where on the trial of an indictment, in which the defendant and others were jointly indicted for the murder of one W., the court instructed the jury as follow: "That if the jury believe from the evidence that the defendant and others, formed the design of taking the life of the said W., whether by hanging or otherwise; that in pursuance of such design, the defendant and the others went in a body to the house of the said W., armed and resolved, and prepared to resist all opposition; that they obtained possession, by force or otherwise, of the body of said W., and bound the arms of the said W., so as to render him helpless; that after they had so obtained possession of the said W., the said defendant, and those then engaged with him, or any one of them, in the presence and hearing of said W., avowed their purpose to take the life of the said W., by hanging or otherwise; that they forced the said W. into a hack, while thus bound, and started to the timber with him; that while on the road to the timber, and when on the banks of the Iowa river, they cast the said W., while thus bound, into said river, from the said hack, or compelled the said W., by threats, or otherwise, to jump from said hack into said river, and they then and there permitted him to drown, while standing by, and made no effort to rescue the said W., if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree;" Held, That the instruction was correct.

And where in the same case, the court further instructed the jury as follows: "That if the jury believe from the evidence, that the defendant and other persons, formed the design of committing personal violence upon the body of the said W., as by lynching or otherwise, but did not design to take his life; that in pursuance of said design, they went in a body to the house of said W., armed and resolved, and prepared, to resist all opposition; that they obtained possession of the person of the said W., and bound his arms, so as to render him helpless; that they forced the said W. into a hack, while thus bound, and started to the timber with him; that before and after they started, one or more thus engaged, in the presence of W. declared that he should be hung, or the he should die before sun-down, or otherwise threatened the life of said W.; that while on the road to the timber, and when on the bank of the

The State of Iowa v. Shelledy.

lowa river, the said W., while thus bound, and in the custody of the said defendant, and others then engaged with him, entertained a reasonable and well-grounded apprehension—an apprehension justified by the circumstances—that the said defendant and others then engaged with him, intended to commit personal violence on the said W., or to take the life of the said W., and under that apprehension, sprung from the carriage into the said river, hoping either to escape the threatened violence, or apprehended death, and was then and there drowned—the said defendant, and others then engaged with him, standing by, neither rescuing, nor offering to rescue, the said W., then the said defendant is guilty of murder in the second degree;" Held, That the instruction was sustain-by authority.

Where death ensues in consequence of the unlawful act of another, it is not necessary that the fatal result should have sprung from an act of commission; but if defendant omitted any act incumbent on him, from which death resulted to the deceased, if there was no malice, it is manslaughter—if there was malice, it is murder.

Where a defendant in a criminal case, seeks to set aside a verdict against him, on the ground that one of the jurors, previous to the trial, had formed or expressed an unqualified opinion that he was guilty of the offense charged, he must show by the record, that the juror was examined upon oath, as to whether he had formed such opinion; and if it is not thus shown, there is no ground for a new trial.

On a motion to set aside a verdict in a criminal case, on the ground that one of the jurors had, previously to the trial, expressed an opinion as to the guilt of the defendant, the affidavit of the defendant is not sufficient, to show that the juror was examined under oath, before he was sworn as a juror, to ascertain whether or not he had formed or expressed such an opinion.

Where it was moved to arrest a judgment in a criminal case, for the reason that the court to which the indictment was presented, was not held at the place fixed by law for holding the same; and where it appeared from the record, that the court-house was in a ruined and dilapidated condition; that the court was first convened at the court-house, and owing to the condition of the same, adjourned to the University building, at which place the court was sitting, when the indictment was presented; Held, That sufficient appeared from the record, to justify the appellate court in assuming that the court-house, owing to its condition, was an improper place for holding court; and that the county court provided for the use of the district court, the University building, or that the same was provided by the sheriff for the use of the court, upon the failure of the county court to provide a place for holding the court. The appellate court will not presume that the district court undertook to try a defendant, indicted for a criminal offense, without the indictment.

In a criminal case, where there is a general verdict of guilty, on an indict-

The State of Iowa v. Shelledy.

ment containing several counts, if any one of them is good, the judgment will be supported.

- It will be presumed that the district court did its duty, and unless the contrary is made to appear affirmatively, the judgment will not be disturbed.
- It is not necessary that it should appear from the records of a cause, that the district court, at each adjournment during the progress of the trial, admonished the jury, that it was their duty not to converse among themselves, on any subject connected with the trial, nor to form or ex-

Appeal from the Johnson District Court.

SATURDAY, JUNE 11.

THE defendant, with fourteen others, was indicted for the murder of Boyd Wilkinson. The indictment contained eight counts, the first of which, after the formal part, read as follows: That Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall, John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, of said county, on the 11th day of May, in the year of our Lord, one thousand and eight hundred and fifty-eight, at Iowa city township, in the said county of Johnson, state of Iowa, in and upon one Boyd Wilkinson, then and there being, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, did make an assault; and that the said Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall, John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, then and there feloniously, wilfully, deliberately, premeditatedly, and of their malice afcrethought, did take him, the said Boyd Wilkinson, into the hands of them, the said Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall. Vol. VIII.—61

The State of lows v. Shelledy.

John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, and did then and there, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, fix, tie, and fasten a certain rope about the arms and body of him, the said Boyd Wilkinson; and then and there, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, they, the said Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall, John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, by means of their threats, menaces, force and violence, him, the said Boyd Wilkinson, did cause and compel to jump, leap, and plunge, into a certain river there situate, wherein there was a great quantity of water, he, the said Boyd Wilkinson, then and there being so fixed, tied, and fastened, about the arms and body, with a rope as aforesaid, by means of which fixing, tieing, and fastening, and by means of said jumping, leaping, and plunging, of the said Boyd Wilkinson, into the river aforesaid, with the water aforesaid, done and caused by the said Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall, John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, in manner and form aforesaid, he, the said Boyd Wilkinson, in the river aforesaid, with the water aforesaid, was then and there choked, suffocated, and drowned, of which choking, suffocation, and drowning, he, the said Boyd Wilkinson, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Frederick M. Irish, Michael Freeman, Henry Gray, Peter Conboy, Philip Clark, Alfred Curtis, Charles Dow, Samuel Shelledy, Charles Brown, Daniel Marshall, John McGuire, George W. Rawson, James Taylor, Patrick McGraith, and Dennis Hogan, in manner and form as aforesaid, him, the said Boyd Wilkinson, on the said eleventh day of May, A.

The State of lows v. Shelledy.

D. 1858, at the county aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the state of Iowa.

The defendant pleaded not guilty, and was tried separ-During the impanneling of the jury, one John Reynolds was called as a juror, and being interrogated under oath, stated that he thought he had formed or expressed an unqualified opinion, or belief, as to the guilt or innocence of the defendant. He was thereupon challenged by the state, and excluded from the jury by the court. The defendant asked the court to allow him to cross-examine the said Reynolds, for the purpose of disproving the said challenge, and showing the competency of the juror, to which the state objected, and the court sustained the objection, and refused to allow the juror to be recalled for the purpose of cross-examination. One David Bortz was also called as a juror, who stated that he had formed or expressed an unqualified opinion, or belief, that the defendant was guilty or not guilty of the offense charged in the indictment. He was then challenged by the state, and the court sustained the challenge. Before the said juror left the box, the defendant asked the said juror, whether the unqualified opinion or belief that he had formed, or expressed, was favorable, or unfavorable, to the state? And thereupon the court interfered, and refused to allow the said question to be asked, and directed the said Bortz not to answer the same.

After the state and the defendant had each challenged one juror peremptorily, the state moved the court to require the defendant to challenge peremptorily another juror, before the state should be required to exercise its second peremptory challenge, and that in case the defendant failed or refused to make such challenge, he should be deemed to waive the same, which motion was sustained by the court; and the said defendant, throughout the impanneling of the said jury, was required to exercise two peremptory chal-

The State of Iowa v. Shelledy.

lenges together, or waive the same. After the defendant had challenged four, and the state three jurors, peremptorily, one Lorenzo Davis was called as a juror, who was challenged peremptorily by the defendant. The court then required the defendant to make his sixth peremptory challenge, or he would be deemed to have waived the same. The defendant thereupon asked the court to have the panel filled, before he should be required to exercise the right of making his sixth peremptory challenge, which request was objected to by the state, and sustained by the court. the state had challenged six jurors peremptorily, and had exhausted its right of challenge, and after the defendant had peremptorily challenged nine jurors, and had waived his tenth challenge, the panel was again filled, and thereupon the defendant peremptorily challenged one William Davis. The defendant then asked the court to fill the vacancy in the jury, caused by the challenge of the said Davis, before he should be required to make his final peremptory challenge, which request being objected to by the state, the court refused to cause the panel to be filled, and decided that the defendant should make his last peremptory challenge from the eleven jurors then in the box, or be held to have waived the same. To all these rulings of the court, in relation to impanneling the jury, the defendant at the time excepted.

Upon the conclusion of the testimony, the court, upon its own motion, among other things, charged the jury as follows:

"If two or more persons conspire together to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in the execution of the design. But if the unlawful act be a trespass only, to make all guilty of murder, the death must happen in the prosecution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although death happen collaterally, or beside the original design."

The State of lows v. Shelledy.

"Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied. It differs from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offence would be only manslaughter, provided such unlawful act or design be not a felony; because, then, the law implies the existence of malice. But if the intent goes no further than to commit a bare trespass, it will be manslaughter."

At the request of the state, the court further instructed the jury as follows:

- 1. That in order to constitute murder in the first degree, under the laws of this state, a design must be formed to kill wilfully—that is, of purpose; deliberately—that is, with cool purpose; maliciously—that is, with malice aforethought; and premeditatedly—that is, the design must be formed before the act by which death is produced occurs, or else the death must have occurred in the perpetration, or attempt to perpetrate, the crime of arson, robbery, may hem or burglary.
- 2. That in order to constitute a premeditated and deliberate homicide, (which is murder in the first degree,) it is not necessary that the design to kill should have existed for any definite or certain space of time; but if the preconceived intention, and cool, deliberate purpose to kill, exist at the moment of the commission of the act, it is all that the law requires.
- 3. That the term "malice aforethought," as used in our statute, in the definition of the crime of murder, is not to be understood merely in the sense of a feeling of malevolence to a particular person, but as meaning that the offense or killing has been attended with such circumstances as are the ordinary symptoms of a wicked, deprayed and malig-

The State of lows v. Shelledy.

nant spirit—a heart regardless of social duty, and deliberately bent upon mischief. And hence, in general, any formed design of doing mischief, which may result in death, may be called malice; and therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be "malice aforethought."

- 4. That malice, or "malice aforethought," (in the language of our statute,) may be express or implied. Express malice is, where one person kills another, with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances, discovering the inward intention and premeditation, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. Implied malice is, where the killing is effected by any deliberate, premeditated, cruel act, evincing a design to take human life, and done without present provocation.
- 5. That where two or more persons conspire to do, and are associated for the purpose of doing, an unlawful act, the act or declaration of one of such persons, while engaged in, and in pursuance of the common object, is the act and declaration of all, for which all are liable, as each person so associated is deemed or presumed to have assented to, or to command, what is done by any other of the conspirators, in furtherance of the common object.
- 6. That the intention of the defendant, and whether there was a premeditated design to kill, at or before the time of the death of Wilkinson, may be gathered from the acts and declarations of the defendant, and other persons associated with him, while engaged in the commission of the alleged unlawful act, or while they were preparing to commit the same; and the jury, in arriving at such intention, and in determining whether there was a premeditated killing, may look at all the circumstances and facts attending the transaction.

The State of Iowa v. Shelledy.

- 7. That where it is sought to reduce the criminal nature of a homicide, from murder in the second degree to manslaughter, by proof of threats on the part of the deceased, it must also be shown, in order to justify the homicide, or mitigate the offense, that such threat came to the knowledge of the party threatened, prior to the commission of the homicide, and that the deceased, at the time of the killing, was in the act of putting said threats into execution, and thereby induced a reasonable belief on the part of the slayer, that his own life was in immediate danger, or that the deceased was about to commit a felony.
- 8. That when a premeditated purpose to kill is entertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done.
- 9. That if the jury believe from the evidence, that the defendant, with other persons, went to the house of Boyd Wilkinson, with the premeditated design to take the life of said Wilkinson, either by hanging or otherwise, and that the death of the said Wilkinson was occasioned by the acts of the said defendant, and others, while engaged in carrying out the design which took them to his house, then, and in that case, the threats of the said Wilkinson, or any provocation he may have given said defendant, and others, or either of them, prior to that time, are to be entirely disregarded, and cannot be received to mitigate the offense, or lessen the criminal nature of the act, unless they show that the design to take life, was abandoned before the death of Wilkinson, as there can be no palliation or justification of a premeditated homicide.
- 10. That where two or more persons are jointly charged with a criminal offense, and it is sought to palliate or justify the offense, by proof of provocation on the part of the person injured, the provocation, in order to palliate or justi-

The State of lows v. Shelledy.

fy as to all, must be shown to extend to all; or, in other words, that in a case of homicide, threats made by the deceased against the person or property of one of the defendants, or one of those engaged with them, and which he was not in the act of putting into execution, at the time of the death, will not justify the defendant, and others engaged with him, nor palliate the criminal nature of their act.

- 11. That the declarations of Gray and others, at the meeting at the Mansion House, or after the company left there to carry out the design of the meeting—that Wilkinson had burned the barn of Clark—that he had threatened to burn the property of others—that said Gray had a warrant, and was authorized to serve the same, and arrest Wilkinson, and the declarations of Gray, that he had before been authorized to search the house of said Wilkinson for stolen goods, which he had found there—and other declarations of a similar character—are not to be received as evidence of those facts; but the defendants, in order to establish such facts, must prove the same by competent evidence.
- That partial variances in the testimony of different witnesses, on minute and collateral points, are of little importance, unless they be of too prominent and striking a nature, to be ascribed to mere inadvertence, inattention, or defect of memory; that it so rarely happens that witnesses of the same transaction, perfectly and entirely agree on all points connected with it, that an entire and complete co-incidence, in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert; and that in determining upon the credence to be given to testimony, by the jury, the real question must always be, whether the points of variance and of discrepancy, be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such variances, viz: inattention or want of memory.
 - 13. That when the existence of deliberate malice in the

The State of lows v. Shelledy.

defendant, and others acting with him, is once ascertained, its continuance down to the perpetration of the meditated act, must be presumed, until there is evidence to repel it, and to show that the wicked purpose was abandoned before the commission of the act.

- 14. That it does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake or misapprehension, they ought not to disregard his testimony altogether, and they should not consider the circumstance further, than as showing inaccuracy of memory or judgment, on the part of the witness.
- 15. That the declarations of the defendant, and those engaged with him, while engaged in the unlawful act, are to be received as evidence of their motives and intentions, only so far as their acts are consistent with those declarations; or, in other words, that where the acts of a person are inconsistent with his declarations, the former are better evidence of his intentions than the latter.
- 16. That if the jury believe that the defendant and others, combined for the purpose of lynching Wilkinson, (the deceased), that they took and bound him, and that in carrying out said intention, the death of Wilkinson occurred, by the acts of the defendants, all who entered into the said combination, or in any way aided or abetted the common design, are guilty of murder in the second degree, whether present or not.
- 17. The jury, if they are satisfied of the homicide, in determining the degree of the crime committed in causing the death, cannot consider any provocation, on the part of the deceased, for the purpose of reducing it from murder to manslaughter—unless said provocation was so recent, that the homicide was committed in a sudden transport of pas-

Vol. VIII.-62

sion, occasioned by that provocation—that is, that if between the provocation and the homicide, there was sufficient time for the blood to cool, passion to subside, and reason to interpose—the provocation, however great, amounts to nought, and cannot be considered by the jury.

- 18. That in determining the time for the passion to cool, the inquiry is, whether the suspension of reason, arising from sudden passion, continued from the time of provocation, till the very instant the act producing death took place; and that if, from any circumstance whatever, it appears that the parties reflected or deliberated, or if, in legal presumption, there was time or opportunity for cooling—that then the provocation cannot be considered by the jury in making up their verdict.
- That if the jury believe from the evidence, that the said Wilkinson, was not thrown or pushed into the river by the said defendant, and others then engaged with him, but that he jumped into the said river himself, either to escape the threatened violence of said defendant, and others engaged with him, or from a reasonable and well grounded apprehension that his life was in danger, and with the hope to save his life; and if the jury further believe, from the evidence, that the said defendant, and others then engaged with him, or any of them, after said Wilkinson was in said river, stood by, and made no effort to save him from drowning, the fact that the said defendant, and others then engaged with him, or some of them, so stood by, and made no effort to rescue the said Wilkinson from drowning, is a circumstance which the jury may take into consideration, in arriving at the intention and purpose with which the party went to the house of, and arrested the said Wilkinson.
- 20. That every man is presumed to intend the necessary consequence of his own acts; and that it is a maxim of the law, that a presumption shall stand until the contrary is proved.
- 21. That under our statute, when a homicide is proved, the presumption is, that it is murder in the second degree;

and if the prosecution would make it murder in the first degree, they must establish the characteristics of that crime, as contemplated by our statute, which provides, that "all murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, mayhem, or burglary, is murder of the first degree;" and if the defendant would reduce it to manslaughter, the burden of proof is on him.

- 22. That where two or more persons combine to do an unlawful act, and death happen to another party in the prosecution of the unlawful act designed, it is murder in all who thus conspire, whether they were present at the time of the death or not. If the unlawful act, contemplated or designed, was to take the life of a human being, or to commit arson, burglary, mayhem, or robbery, it is murder in in the first degree. If the design or intention was to commit any other unlawful act, it is murder in the second degree, or manslaughter, according to the circumstances.
- That if the jury believe from the evidence, that the defendant, and others, formed the design of taking the life of the said Wilkinson, whether by hanging or otherwise; that in pursuance of such design, the defendant and others went in a body to the house of said Wilkinson, armed, and resolved, and prepared to resist all opposition; that they obtained possession, by force, or otherwise, of the body of said Wilkinson, and bound the arms of the said Wilkinson, so as to render him helpless; that after they had so obtained possession of the said Wilkinson, the said defendant, and those then engaged with him, or any of them, in the presence and hearing of the said Wilkinson, avowed their purpose to take the life of the said Wilkinson, by hanging or otherwise; that they forced the said Wilkinson into a hack, while thus bound, and started to the timber with him; that while on the road to the timber, and when on the bank of

the Iowa river, they cast the said Wilkinson, while thus bound, into said river, from said hack, or compelled the said Wilkinson, by threats or otherwise, to jump from said hack into said river, and they then and there permitted him to drown, while standing by, and made no effort to rescue the said Wilkinson, if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree.

24. That if the jury believe from the evidence, that the defendant, and other persons, formed the design of committing personal violence on the body of the said Wilkinson, as by lynching, or otherwise, but did not design to take his life; that in pursuance of such design, they went in a body to the house of the said Wilkinson, armed, and resolved and prepared, to resist all opposition; that they obtained possession of the body of the said Wilkinson, and bound his arms, so as to render the said Wilkinson helpless; that they forced the said Wilkinson into a hack, while thus bound, and started to the timber with him; that before and after they thus started, one or more of those thus engaged, in the presence of Wilkinson, declared that he should be hung, or that he should die before sundown, or otherwise threatened the life of the said Wilkinson; that while on the road to the timber, and when on the bank of the Iowa river, the said Wilkinson, while thus bound, and in the custody of the said defendant, and others then engaged with him, entertained a reasonable and well grounded apprehension-an apprehension justified by the circumstances—that the said defendant, and others then engaged with him, intended to commit personal violence on the said Wilkinson, or to take the life of the said Wilkinson, and under that apprehension sprang from the carriage into the said river, hoping thereby to escape the threatened violence or apprehended death, and was then and there drowned—the said defendant, and others then engaged with him, standing by, and neither rescuing nor offering to rescue the said Wilkinson-then the said defendant is guilty of murder in the second degree.

25. That while private persons may arrest another, where a public offense is committed, or attempted, in their presence, or when a felony has been committed, and they have reasonable cause for believing the person arrested, to have committed it; yet in such a case, the persons making the arrest, must confine themselves within the strict limits of the law, and if they exceed those limits, the person, or persons, making the arrest, become trespassers ab initio-all their acts are void—and they are liable for the consequences; and if the jury believe from the evidence, that the defendant, and others then engaged with him, went to the house of Wilkinson, knowing that a felony had been committed, and having reasonable cause to believe that Wilkinson committed it, for the purpose of arresting the said Wilkinson; that before, or at the time of arresting the said Wilkinson, they determined to make him confess the commission of the alleged felony, by the use of personal violence; that in pursuance of this determination, they bound his arms, forced him into a hack, and started with him to the timber; that while on the road to the timber, the said Wilkinson, from a reasonable apprehension that his life was in danger, or in the hope of escaping from the threatened punishment, jumped from the said hack, thus bound, into the Iowa river, and was drowned, that then, and in that case, the said defendant, and those then acting with him, are trespassers from the beginning—the original arrest became unlawful—and the defendant is guilty of murder in the second degree.

26. That if the jury believe from the evidence, that the defendant, and others, conspired to take the life of the said Wilkinson, whether by hanging, or otherwise; that with such premeditated design, they went to said Wilkinson's, and took him into their custody; that they then bound his arms so as to render him helpless, forced him into a hack, and started with him to the timber on the Iowa river, with the avowed design of hanging him; that while in their custody, and

thus bound, and when on the bank of said river, the said Wilkinson, from a well-founded apprehension that his life was in danger—either hoping to escape, or from a choice as to the manner of his death—jumped from said hack into said river, and was drowned; and that the said defendant and others engaged with him, stood by, and permitted him to drown, making no effort to rescue said Wilkinson, then, and in that case, the fact that the said defendants, and others engaged with him, designed to take the life of the said Wilkinson, by hanging, or otherwise, and not by drowning, is utterly immaterial, and cannot reduce the criminal nature of the act to murder in the second degree.

- That if the jury believe from the evidence, that defendant, with others, was at the meeting at the Mansion House, and aided in the election of officers, or assented to their election; and that they afterwards formed into line at the Clark place, or otherwise put themselves under the command of Captain Gray, and other officers, with the intention to resist all opposition, and carry out or execute the orders of their leaders or officers; that said leaders intended to take Wilkinson out and lynch him; and that said Wilkinson lost his life in the prosecution of that design—then, and in that case, unless they abandoned the enterprise before its completion, there was such a combination or conspiracy, as makes the acts and declarations of one, the acts and declarations of all who so combined; and that they are each and all guilty of murder in the second degree, whether present at the death or not.
- 28. That if the whole evidence, taken together, produced such a conviction on the mind of the jury, of the guilt of the prisoner, as they would act upon in a matter of the highest importance to themselves, in a like case, it is their duty to convict.
- 29. In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which

occasions it. If it be in the prosecution of a felonious intent, or in consequence of an act naturally tending to bloodshed, it will be murder. If no more was intended than a mere civil trespass, it is manslaughter.

30. That if the jury believe the defendant and others, took Boyd Wilkinson, and bound him, and put him into a hack, or, in other words, took him bound into their possession, it was incumbent upon them to return him safely to his family; and that it is not necessary that the fatal result should have sprung from an act of commission, for if defendant omitted an act incumbent on him, from which death resulted to deceased, he is guilty of manslaughter, if there was no malice; if there was malice, it is murder.

To the giving of all these instructions, the defendant excepted. The court also, at the instance of the defendant, instructed the jury as follows:

- 3. That murder, either in the first or second degree, cannot be committed, without proof of malice on the part of those committing it, and that such malice existed at the time the killing was done.
- 4. Where a witness is contradicted in any material statement sworn to by him, by other witnesses on the trial, such as that the witness had heard threatening language used by any of the defendants, when others were equally present and in hearing, who swear that no such threat was made; that he knew nothing of a meeting of defendants at the Mansion House, when he had previously mentioned it to another witness, and manifested a desire or haste to be present at such meeting; that one of the alleged conspirators was on the ground, and giving directions for the formation of the company, when, in fact, such person was not present for a long time thereafter; that he had not said he had gone to inform a third person of what was going on by the company, when, in fact, he had so said; that he had not expressed an approbation of the proceedings of the defend. ants, or that the interests of community required that the deceased should be read out of the place, when, in fact, the

witness had repeatedly expressed and declared both, in the presence of different witnesses; these things, or either of them, or any other like contradictions, are legal evidence tending to discredit the entire testimony of the witness, both by way of impeachment, and also as going to show complicity in the pretended conspiracy; but the jury are to determine whether there are any such contradictions, and also who of the contradicting witnesses, are most worthy of belief.

- 6. A person is not required, by law, to put his cwn life in peril to save the life of another.
- 9. That if the jumping from the hack into the river, by Wilkinson, was his own voluntary act, and not the result of any act or force of the defendants, the jury should find the defendant not guilty; and that such act or force cannot be presumed against the defendant, but must first be clearly proved by the state, before the defendant can be found guilty under this indictment. And, further, if the evidence leaves so much as one rational doubt in the minds of the jury, as to whether the defendant forced the deceased to jump in, they are bound by law to return a verdict of not guilty—the state being first bound, before a conviction can be had, to prove such act or force, used by the defendants, and what it was.
- 10. With respect to all verbal admissions, declaration, or conversations, evidence of them should always be received with great caution. Consisting, as it does, in the repetition of oral statements, it is subject to much imperfection and mistake; the party himself being misinformed, or not having expressed his own meaning, or the witness having misunderstood him, or from the infirmity of human memory. It frequently happens, also, that the witness, unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. And, especially, where the witness has not heard all the admissions, declarations, or conversation, and testifies only to parts thereof, should cau-

tion be exercised. It then becomes very unsatisfactory and imperfect evidence—the lowest grade of evidence.

- 11. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all donbt; it is their duty to decide in favor of the party on whose side the evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious nature of the consequences of a wrong decision, the jurors are required to be satisfied beyond any reasonable doubt, or it is their duty to acquit--the charge not being proved by that higher degree of evidence which the law In civil cases, it is sufficient if the evidence on the whole, agrees with and supports the hypothesis, which it is adduced to prove; but in criminal cases, it must exclude every other hypothesis but that of the guilt of the party. The law presumes the defendant innocent of the offense charged against him in the indictment, and this presumption remains in force, and the jury is bound to act on it, until the state proves his guilt beyond any reasonable doubt.
- 12. No presumption arises against the defendant, from the proof that a homicide, or the killing of a human being, has been perpetrated, until the state has first proved beyond a reasonable doubt, that the defendant is guilty of the killing, in the manner, and at the place charged; and this law is as applicable to the crime of manslaughter, as to murder in either degree.
- 13. That the defendant is entitled to every reasonable doubt, and "that neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose of conviction, unless it generate full belief of every material allegation in the indictment, to the exclusion of all reasonable doubt, for it is not enough that the evidence goes to show the guilt of the defendant. It (the evidence), must be inconsistent, with any reasonable supposi-

Vol. VIII.-63

tion of his innocence," or the jury will find the defendant not guilty.

- 14. The jury must be satisfied beyond any reasonable doubt, that the death of Wilkinson, was either the necessary, or the usual, probable, or natural result of the acts of the defendant, specified in the indictment, and not of his own act, or they must find the defendant not guilty.
- 15. If the jury believe from the evidence, that Wilkinson voluntarily jumped into the river, and drowned himself, it will be their duty to find the defendant not guilty.
- 16. A man may jump, or throw himself into a river, under such circumstances as to render it not a voluntary act, by reason of force applied either to the body or mind. It becomes, then, the guilty act of those who compelled the deceased to take the step; but to arrive at the conclusion that Wilkinson, the deceased, was compelled, by the force applied to his mind by the deferdant, to jump into the river, so as to make the defendant guilty of murder, the jury must be satisfied, beyond any reasonable doubt, of the four following propositions, to-wit: 1. That Wilkinson, the deceased, apprehended immediate violence. such apprehension on the part of the deceased, was well grounded, from the circumstances by which he was surrounded. 3. That the step was taken by Wilkinson, and that he jumped into the river, with a view to make his escape, and not put an end to his life. 4. That the step thus taken, and the jumping into the river by deceased, with a view to escape, was such a step as a reasonable man would take to effect his escape. And if the jury entertain a reasonable doubt of any one or more of these four propositions, although they are fully satisfied of the truth of the other three, it will be their duty to find the defendants not guilty.

The following instructions, asked by the defendant, were refused by the court:

1. A conspiracy to do the act complained of, (in this case murder,) must first be proved to have been the original object and design of the co-conspirators, before they can

jointly be held responsible for the acts or declarations of any one individual of their number, looking to the consummation of the original object or design.

- The leading object of the jury in this case, should be to ascertain the original and real motive and design of the defendant, and those associated with him, in the arrest of Boyd Wilkinson. Upon this point the open publicity of the meetings-their being all held, and the acts charged, performed in open daylight, without remonstrance or opposition from the public, furnish proper evidence for the consideration of the jury in determining upon their true motives and designs. The declarations made at the meeting, such as, "that their motive was to arrest him, and bring him to justice; that it was for the purpose of protecting the life and property of Philip Clark, and other citizens, who had been unjustly deprived and robbed of their property, and beaten and threatened with death; and that not a hair of his head was to be hurt—are all legal evidence tending to show the real design and motives.
- 4. It is not necessary for the defendant to prove from the records of the county, or in any other way, that Philip Clark had actually been driven from and robbed of his property; that the deceased had made threats both against his property and his life, and for such threats had been required to furnish surety of the peace, or be committed, and was, notwithstanding, still suffered by the officers to run at large, and repeat and execute his threats, if the jury are satisfied from the testimony of Henry Felkner, J. D. Tevis, and others, who attended both meetings, that the persons charged with unlawful conspiracy, really acted in good faith at their meetings, under the belief that such were the facts.

The jury returned a verdict of guilty of murder in the second degree, and thereupon the defendant filed a motion to set aside the verdict, and for a new trial, setting out eighteen grounds for the motion, among which are the following:

11. The court permitted the jury to separate after they

had been sworn, and after part of the evidence had been given, and before they rendered their verdict.

- 12. The defendant was not present in court during the whole of the trial, but was absent a part of the time while the court was instructing the jury, and when the jury retired to consider of their verdict.
- 13. The court misdirected the jury—giving instructions which should not have been given, and refusing those which should have been given.
- 14. Because Daniel A. Shafer, one of the jurors, had prejudged the defendant's case, and expressed an unqualified opinion and belief, before the trial, that the defendant was guilty.

The fourteenth ground of the motion, was supported by the affidavits of three persons, who deposed to having heard the said Shafer, before the trial, express his opinion that the defendant was guilty, and ought to be punished, and also by the affidavit of the defendant himself, who stated that until after the trial, he had no knowledge that the said Shafer, previously to the trial, had expressed an opinion adverse to the defendant, and that the said juror on his examination under oath, before he was sworn as a juror, stated that he had not either formed or expressed an opinion, as to the guilt or innocence of the defendant. The juror, Shafer, also filed his affidavit, denying that he had ever used the language imputed to him, or that previous to the trial, he had formed or expressed any opinion on the subject.

The motion to set aside the verdict having been overruled, the defendant then filed a motion in arrest of judgment, assigning as reasons therefor, the following:

- 1. Because the court to which said indictment was presented, was not held at the place fixed by law for holding the same.
- 2. Because the indictment is not sufficient to warrant any judgment against the said defendant.
 - 3. Because the court had no jurisdiction to try the de-

fendant on the indictment at the time of the trial—a change of venue having been applied for by F. M. Irish, one of the defendants, which was allowed by the court, and the venue changed to Scott county, in the Seventh Judicial District, before the trial of said Shelledy had commenced.

- 4. Because the second count in said indictment, is entirely insufficient to warrant a judgment against the defendant.
- 5. Because there is a material variance between the evidence as to the manner and means of killing, and all the counts in said indictment, except the second, in which said second count no manner or means of killing is alleged.

The motion in arrest of judgment was overruled, and the defendant sentenced to ten years imprisonment in the penitentiary, at hard labor, and to pay the costs of prosecution—from which judgment he appeals. The errors assigned, and other material facts, sufficiently appear from the opinion of the court.

William Smyth and Joseph Knox, for the appellant, in support of the errors assigned, cited The State v. Burton, 2 Dev. & Bat., 196; ex parte Vermilyea, 6 Cow., 555; 7 1b., 108; The People v. Mather, 4 Wend., 229; Mann v. Glover, 2 G. Greene, 195; Irvine v. Kean, 14 S. & Rawle, 292; The Com. v. Lesher, 17 Ib., 155; Freeman v. The People, 4 Denio, 1; The People v. Bodine, 1 Ib., 281; 2 Gra. & W. on New Trials, 283, note; 1 Stark. Ev., 184; Code, sec. 2988; The State v. Pierce, ante 231; 1 Chitty Cr. Law, 544; 2 Gra. & W. on New Trials, 472; The People v. Rector, 19 Wend., 576; 1 Greenl. Ev., 449; 1 Russ. on Crimes, 24; Whart. Am. Law of Homicide, 345; Regina v. Barrett, 2 Eng. Com. Law, 343; Regina v. Hames, 2 Ib., 368; The State v. Smith, 32 Maine, 369; 1 Gallison C. C., 628; Rex v. Rawlins, 7 C. & P., 153; Jones v. The State, 3 Blackf., 475; 8 Johns., 437; 11 Ib., 442; Van Doren v. Walker, 2 Caines, 373.

S. A. Rice, (Attorney General), for the state, cited Code, secs. 2982, 2986; 13 State Trials, 334; King v. Edmonds, 6 Eng. Com. Law, 502; 1 Chitty Cr. Law, 547; The People v. Rector, 19 Wend., 569; The State v. Pierce, ante 231; 4 Block. Com., 353; The State v. Benton, 2 Dev. & Bat., 490; 1 Chitty Cr. Law, 539; 1 Archb., 163; Com. v. Rogers, 7 Metc., 500; The State v. Potter, 18 Conn., 175; The State v. Cokely, 4 Iowa, 477; Code, sec. 2399; 1 Greenl. Ev., 445; The U.S. v. Ross, 1 Gallison, 629; 2 Bishop Cr. Law, sec. 626; Carroll v. The State, 23 Ala., 28; 1 Bishop Cr. Law, sec. 254; Arch. Cr. Pl., 9; Com. v. Dana, 2 Metc., 329; Beets v. The State, Meigs, 106; Brennan v. The People, 15 Ill., 511; Wharton, 261; 1 Russ. on Crimes, 30; Gover v. Dill, 3 Iowa, 342; 3 Greenl. Ev., 14; 9 Metc., 103; Com. v. Webster, 5 Cush., 305; 1 Greenl. Ev., sec. 34; Regina v. Pitts, 1 C. & M., 159; The U. S. v. Fermoss, 4 Mason, 505; 1 Bishop Cr. Law, sec. 230; Amor v. The State, 11 Humph., 159; The U. S. v. Warner, 4 McLean, 478; Regina v. Haines, 2 C. & K., 371; Taylor v. Greeley, 3 Greenl., 204; 2 Maine, 198; 3 Jones (N. C.) 443; Castles v. The State, 19 Geo., 628; 1 Johns., 320; 1 Blackf., 319; 7 How., 420; 8 Greenl., 113; 3 Hill, 194: Garder v. Pickett, 19 Wend., 186; 3 Gra. & W. on New Trials, 793; 3 Johns., 528; Kelley v. Varney, 2 Frost, 99.

STOCKTON, J.*—The statute provides that a challenge for cause, may be taken either by the state or by the defendant; and if for implied bias, may be for the reason, that the juror has formed or expressed an unqualified opinion or belief, that the prisoner is guilty or not guilty of the offense charged. Code, secs. 2982, 2986.

It was sufficient cause of challenge to the juror, Reynolds, in this instance, that on his examination as a witness, to

^{*}Weight, C. J., dissented upon the points indicated in the opinion, but wrote no dissenting opinion.

prove the challenge as to him on the part of the state, he testified that "he thought he had formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty of the offense charged." It need not appear that the opinion or belief, formed or expressed by the juror, was in favor of the prisoner, to constitute the same good cause of challenge. It is sufficient if the opinion is formed or expressed either for or against him. If in his favor, it is not claimed but that the challenge was properly allowed; if against him, the defendant has no cause of complaint, that a juror who has formed or expressed the opinion that he is guilty of the offense charged against him, has been challenged for that cause by the opposite party.

The proof in support of the challenge having been heard by the court, the defendant objected to the sufficiency of the challenge, and to the sufficiency of the proof to support the The court overruled the objection, and allowed the challenge; and after the jury had left the jury-box, the defendant asked to be allowed to cross-examine him, and to have the juror recalled for the purpose of disproving the challenge, and to show his competency as a juror. being objected to by the state, the court refused to the defendant the privilege of recalling the juror, for the purpose The question as to the proprieof such cross-examination. ty of recalling the juror, was within the discretion of the district court; and that discretion will not be controlled. unless it is shown to have been greatly abused. ple v. Rector, 19 Wend., 576; Law v. Merrills, 6 Ib., 280.

The juror, Bortz, was challenged by the state, for particular cause, on the gruond of implied bias, and being sworn as a witness, for the purpose of proving the challenge, declared that he had formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty of the offense charged. The counsel for the defendant then asked the said juror, "whether the unqualified opinion or belief that he had formed or expressed, was favorable or un-

favorable to the state." The court refused to permit the juror to answer the question, and decided that the testimony was sufficient to sustain the challenge, and allowed the same. We think there was no error in this ruling of the court. It was sufficient cause of challenge, that the juror had formed an unqualified opinion, and no useful purpose was to be obtained by allowing him to state whether the opinion was favorable or unfavorable to the state.

The defendant moved the court, that before he should be required to make his sixth peremptory challenge, the panel of jurors might be filled. Objection being made by the state, the court sustained the objection, and refused to order the panel to be filled; and there being but eleven jurors in the box, the defendant was required to exercise his right of making his sixth peremptory challenge, or waive the same. And after the district attorney had exhausted the peremptory challenges allowed to the state, the defendant challenged peremptorily one Davis, who was excluded from the jury-box, and thereupon moved the court to fill the vacancy in the panel of the jury, before he, (the defendant), should make the last peremptory challenge remaining to to him. Objection being made, the court decided that the defeudant should make his last peremptory challenge from the eleven jurors then in the jury-box, or in case of failure to do so, he should be deemed to have waived the same.

The statute has provided, in civil causes, that "after each challenge, the vacancy shall, if required, be filled before farther challenges are made." Code, sec. 1775. There is no such provision, however, applicable to criminal causes; and it is the opinion of a majority of the court, that in the absence of any statutory direction, the mode of proceeding is left to the discretion of the district court; and unless there has been a gross abuse of this discretion, there is no call for the interference of the court. State v. Potter, 18 Conn., 175. (Wright, C. J., dissenting).

In the absence of any rule of law on the subject, the ma-

jority are of opinion that the court, it is to presumed, has adopted a rule of its own, and that the same has been followed in impanneling the jury. And where this has been done, no such prejudice has resulted to the defendant, as to require a reversal of the judgment, unless the discretion of the court in the premises is shown to have been greatly abused. (WRIGHT, C. J., dissenting.)

Exception was taken to the instructions given to the jury at the request of the state, and also to those given by the court, on its own motion, and to the refusal of the court to give certain instructions asked by defendant. were directed, that "if two or more persons conspire together to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in, the execution of the design. If the unlawful act be a trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although the death happened collaterally, or beside the original design." There was no error in this direction of the court. Foster, 258, 344, 351; 1 East. P. C., 255, 259; 1 Hale P. C., 443, 444; U. S. v. Ross, 1 Gallison, 626; 2 Bishop Cr. Law, 626.

The direction of the court to the jury, as to what constituted manslaughter, was as favorable to the defendant as he could, in reason, require to be given. The common law definition of manslaughter has not been changed by our statute, and if the court erred, it was error on the side of the prisoner, in charging the jury, that in the commission of an unlawful act, or in carrying out an unlawful design, if the intent go no further than the commission of a bare trespass, and death ensues, it will only be manslaughter. 2 Bishop Cr. Law, sec. 624, 627; The People v. Enoch, 13 Wend., 163; The People v. Rector, 19 Ib., 592.

The fifteenth instruction given at the request of the state, Vol. VIII.—61

was as follows: "That the declarations of the defendant, and those engaged with him in the unlawful act, are to be received as evidence of their motives and intentions, only so far as their acts are consistent with those declarations; or, in other words, where the acts of a person are inconsistent with his declarations, the former are better evidence of his intentions than the latter." This is but a statement, in another form, of the rule laid down by the elementary law writers, that every person is presumed to contemplate the ordinary and natural consequences of his own acts. 1 Greenl. Ev., sec. 14. Declarations made at the time of the transaction, expressive of its character, motive or object, are regarded as verbal acts, indicating a present purpose and intention, and are, therefore, admitted in proof, like other material facts; they are parts of the res qestæ. Ibid. sec. But where the declaration and the act are inconsistent, if the act goes beyond the declaration, or contradicts it, the presumption of intention is to be gathered from the act, upon the plain and obvious principle, that the party must be presumed to intend to do that which he voluntarily and wilfully does in fact do-his acts speak louder than his words.

The court, in the twenty-third instruction, directed the jury, that if the defendant, and others, formed the design of taking the life of Wilkinson, by hanging or otherwise, and in pursuance of such design, armed, and resolved and prepared to resist all opposition, obtained possession of his body, and bound him, so as to render him helpless, and avowed their purpose to take his life, by hanging or otherwise; that they forced him, thus bound, into a carriage, and started with him to the woods, and that while on the road, and near the river, they either cast him into the river, thus bound, or compelled him, by threats or otherwise, to jump from the carriage into the river, and permitted him to be drowned, they standing by and making no effort to rescue him, if by reasonable effort they might have done so, then the defendant was guilty of murder in the first degree. And

in the twenty fourth instruction, that if, with the design of committing personal violence upon the body of Wilkinson, but without design to take his life, they started with him, bound as aforesaid, to the woods, declaring that he should be hung, or otherwise threatening his life, and Wilkinson, from a reasonable and well grouned apprehension of violence, or loss of life, hoping to escape the threatened violence, or apprehended death, jumped from the carriage into the river, and was drowned, the defendant, and those engaged with him, standing by, and neither rescuing or offering to rescue Wilkinson, that then defendant was guilty of murder in the second degree.

This instruction is sustained by authority. In Regina v. Pitts, 1 Carr. & Mar., 284, (41 Eng. Com. Law), the jury were directed, that "a man may throw himself into a river, under such circumstances as render it not a voluntary act, by reason of force applied either to the body or the mind. It then becomes the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased is surrounded; not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might Indifference manifested by defendant to the fate of Wilkinson, in not offering to rescue him from drowning, when by reasonable efforts his life might have been saved, was a pregnant circumstance, from which the intentions of defendant as to the deceased, were to be inferred, and from which the jury might lawfully assume that he was actuated by malice or ill will.

The court further charged the jury, that "it was not necessary that the fatal result should have sprung from an act of commission; but if defendant omitted any act incumbent on him, from which death resulted to the deceased, if there was no malice, it was manslaughter; if there was malice, it was murder." The proposition is sometimes stated, that where one, by his negligence, has contrib-

uted to the death of another, he is guilty of manslaughter. Reg. v. Levindall, 2 Carr & K., 230. And it is no defense that the death of the deceased was caused by the negligence of others, as well as by that of the prisoner; for if the death of the deceased be caused, partly by the negligence of the prisoner, and partly by the negligence of others, the prisoner, and all those others, are guilty of manslaughter. Regina v. Haines, 2 Carr. & K., 368.

The master of a ship compelled a seaman to go aloft, in a state of great debility and exhaustion, when he could not go aloft without danger of death, or a serious bodily injury, which facts were known to the master, who nevertheless persisted in causing him to go aloft, and the seaman fell from the mast and was drowned. It was held, that if the jury believed that the circumstances were such, that the master must and ought to have foreseen the result, and that his conduct was persisted in from personal malice to the deceased, or from such a brutal malignity of conduct as evinced a heart regardless of social duty, and fatally bent on mischief, the defendant was guilty of murder; but if the jury believed there was no actual malice to the deceased, nor constructive malice, arising from brutal malignity, still, if the circumstances showed gross heedlessness, want of due cantion, or the unreasonable exercise of authority on the part of the master, he was guilty of manslaughter. The United States v. Freeman, 4 Mason, 505; The United States v. Warner, 4 McLean, 463; 1 Bishop's Cr. Law, sec. 230.

The defendant moved the court for a new trial; and, among other causes, alleged that one of the jurors, Shafer, had expressed an unqualified opinion and belief, before the trial, and before he was called as a juror, that the defendant was guilty of the crime charged against him. In support of the motion, affidavits of three persons were filed, who depose to having heard the juror, before the trial, express his opinion that defendant was guilty, and ought to be punished. The affidavit of the defendant was also put in, to the effect, that until after the trial, he had no knowledge

that the said Shafer had, previously to the trial, expressed the opinion or belief, that he was guilty of the offense charged; and that the said Shafer, on his examination on oath, before he was sworn as a juror, stated that he had not either formed or expressed an opinion or belief, that defendant was guilty, or not guilty. Besides this affidavit of the defendant, there is nothing to show that the juror was examined, before he was sworn as a juror, to ascertain whether or not, he had formed or expressed an opinion as to the guilt, or innocence of defendant.

The defendant's affidavit was not sufficient for that The challenge is required, by the statute, to be taken when the juror appears, and before he is sworn, unless the court permit it to be taken after the juror is sworn. and before the jury is completed. Code, section 2979. the juror had been examined before he was sworn, and upon such examination, had stated that he had not formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty, of the offense charged, though not among the causes enumerated in the Code for which a new trial may be granted, yet if it should afterwards appear that the juror had sworn falsely, and that he had, in fact, formed or expressed an opinion that the defendant was guilty, we think it would afford good cause for granting a new trial. But defendant, to take advantage of such fact, must show, by the record, that the juror was examined on oath, as to whether he had formed such opinion or belief; and if it is not shown that he was so examined, it is no ground for a new trial, that the juror's opinion was made up beforehand.

The motion in arrest of judgment, was based upon the following reasons: 1. That the court to which said indictment was presented, was not held at the place fixed by law for holding the same, at the time in the term when the same was presented. The record shows that the indictment was presented to the court, while the same was sitting at the "University building" at Iowa City, although there was

then a regular court-house at Iowa City, for the county of Johnson. It further shows that the said court-house was in a somewhat ruined and dilapidated condition; that the court was first convened at the court-house, and owing to the condition of the same, adjourned to the University building. All courts must sit at the places designated for that purpose, pursuant to statute, unless, by common consent, some other place is fixed upon. Code, section 1597. Where the county is not provided with a regular court-house, and if no suitable place be provided by the county court, the district court may direct the sheriff to procure one. Code, sections 1573, 1574.

We think the record shows enough to justify this court in assuming, that the court-house, owing to its ruined and dilapidated condition, was an improper place for holding court; and that the county court provided, for the use of the court the University building, or failing to provide any place, the said building was provided by the sheriff, for the use of the court.

2. That the court had no jurisdiction to try the defendant, because a change of venue had been granted by the court to F. M. Irish, a defendant jointly indicted with said Shelledy, and the court had directed that said Irish be tried in Scott county, before the trial of the present defendant was commenced. It is urged by defendant, that as the law requires that the clerk shall make out and certify a transcript of all the proceedings appearing upon the record of the court, which, together with the indictment, and all the papers in the cause, must be transmitted to the clerk of the court, to which venue has been changed, (Code, sec. 3273), that no trial of the defendant, Shelledy, can be had in Johnson county, when it is to be presumed that the indictment has been sent to Scott county, for the trial of Irish, as the This court will not presume that the district law requires. court of Johnson county undertook to try the present defendant, without the indictment; and as he did not apply for a change of venue, and none was directed as to him, we think he was properly tried in Johnson county.

Temple v. Gove et al.

The third ground of the motion in arrest of judgment is, that the second count of the indictment is bad; that there was a general verdict of guilty, without reference to any particular count; and that the court could not render any judgment on the verdict, where there was one defective count. It will not be necessary for us to inquire, whether It is not claimed that the counts the second count is bad. are all bad. We are satisfied, that where there is a general verdict of guilty, on an indictment containing several counts, if any one of them is good, the judgment will be supported. Regina v. Ingram, 1 Salkeld., 384; Grant v. Astle, Douglas, 730; The U. S. v. Bowers, 5 Wheaton, 206; The People v. Curling, 1 Johnson, 322; The People v. Wiley, 3 Hill, 213; Hudson v. State, 1 Blackf., 318; 1 Arch. Cr. Plead. & Ev., 175; 1 Chitty Cr. Plead., 249.

The next assignment of error, is for the reason that it does not appear that the district court, at each adjournment, during the progress of the trial, admonished the jury that it was their duty not to converse among themselves, on any subject connected with the trial, nor to form or express any opinion thereon, until the cause was finally submitted to them. It is not necessary that this should appear affirmatively from the record. It is presumed that the district court did its duty; and unless the contrary is made to appear, affirmatively, the judgment will not be disturbed.

It is the opinion of the majority of the court, that there is no error shown in the proceedings of the district court, and the judgment is affirmed.

TEMPLE v. Gove et al.

A bill in equity to recover on a lost note, or other written instrument, is maintainable on the ground that complainant seeks to obtain a discovery from the respondent, as to the instrument lost or destroyed, and also relief consequent upon the discovery.

Such a bill is required to state, that without the desired discovery, the par-

Temple v. Gove et al.

ty has not sufficient evidence to maintain a suit at law, and should also state the loss or destruction of the instrument.

Where the instrument is not lost, or where the complainant has other sufficient evidence, to establish its contents, his proper remedy is at law.

Appeal from the Winneshiek District Court.

SATURDAY, JUNE 11.

In Equity. Complainant seeks to recover upon a lost note, which he alleges was made to one Dobney, and indorsed. The giving of the note is admitted, but its transfer and loss are denied—the answer being under oath. The complainant recovered, and the respondents appeal.

E. E. Cooley, for the appellants.

- I. There is no proof that payee transferred the note to plaintiff, by indorsement and delivery. The title to negotiable paper, payable to order, can be transferred only by indorsement and delivery. Belcher v. Campbell, 8 O. B., 1; Bromage v. Lloyd, 1 Exchequer, 32; Clark v. Boyd, 2 Ohio, 56; Clark v. Sigourney, 17 Conn., 511; 2 Am. Lead. Cases, 296-7, note; Ellis v. Brown, 6 Barb., 282; 4 Greene, 157; Code, sec. 947. The denial that a note has been indorsed, is equivalent to a denial of indorsement and delivery, Marston v. Allen, 9 M. & W., 404; 2 Am. Lead. Cases, 296 and 7, note. It does not appear that plaintiff ever had possession of the note. Averments by way of recital, are bad. Stephen's Pleading, 388; 1 Iowa, 546; 3 Ib., 582.
- II. The petition does not allege that the note, is not in the power or possession of the plaintiff. This is a jurisdictional defect. Story's Eq. Jur., sec. 88.
- III. There is no proof of the loss of the note. Without this, plantiff does not show himself entitled to the aid of a court of equity. It must be established on the hearing, if not admitted in the answer. Story's Eq. Jur., sec-

Edinger v. Henchler et al.

88. The allegation of loss is not admitted in the answer. The denial of knowledge, or information, concerning a fact, is a sufficient reason for not admitting or denying it. Code, sec. 1742-3.

IV. No sufficient bond of indemnity was tendered to defendants. The defendants were severally liable on the note—the bond offered ran to them jointly. The sufficiency of the bond was put in issue—no proof upon that point was given.

WRIGHT, C. J.—There is no testimony, whatever to sustain this decree. To go no further, we remark that one fatal defect consists in an entire want of proof as to the loss of the note. There is no evidence in the case, except the deposition of Dobney, the payee of the note, who swears alone to the execution of the note and its transfer.

The ground upon which such a bill is maintainable is, that complainant seeks to obtain a discovery from respondent of an instrument, lost or destroyed, and also relief consequent upon the discovery. The bill itself is required to state, that without the desired discovery, the party has not sufficient evidence to maintain a suit at law, and of course should state the loss or destruction. If the instrument is not lost, or if the complainant has other sufficient evidence to establish its contents, his proper remedy is at law. Story's Eq. Pl., secs. 304, 313, 713, 288; Finley v. Hinde, 1 Pet., 244; Milf. Ch. Pl., 124, 125; Walmsley v. Child, 1 Ves., 342; Livingston v. Livingston, 4 Johns. Ch., 294.

Decree reversed.

EDINGER v. HENCHLER et al.

Where in an action of trespass, for taking certain goods, wares and merchandise, the defendants answered, denying the trespass, and the plaintiff offered evidence to show, that the goods were taken by the sheriff, under an attachment issued in a suit wherein B. B. were plaintiffs, Vol. VIII.—65

Edinger v. Henchler et al.

and M. B. were defendants, which writ, with the return of the officer thereon, was also offered in evidence; and that the defendants executed to the sheriff a bond of indemnity to induce him to attach the goods; and where the defendants then offered in evidence, the original papers in the suit of B. B. v. M. B., including the notice, petition, affidavit for attachment, and notes and accounts sued on, in which suit a judgment by default had been claimed, to which the plaintiff objected, but the objection was overruled, and the evidence admitted; and where the plaintiff asked the court, to instruct the jury as follows: "That the notes. accounts, and papers, in the suit of B. B. v. M. B., not being proved are not evidence in this suit, of any indebtedness between the parties thereto;" which instruction the court refused to give; Held, 1. That the papers offered in evidence by the defendants, were prima facie evidence of an indebtedness existing from M. B. to B. B., and so far as that fact was relevant, were proper to be given in evidence; 2. That the instruction asked was irrelevant, and properly refused.

Appeal from the Des Moines District Court.

SATURDAY, JUNE 11.

This was an action of trespass vi et armis, for entering the storehouse of plaintiff, taking and keeping possession of the same, and turning plaintiff out of doors, and for forcibly taking and carrying away from the possession of plaintiff, the goods, wares, and merchandise situate in said storehouse, of the property of plaintiff, of great value, and to his damage, six thousand dollars. The answer was a simple denial of the allegations of the petition.

On the trial, the plaintiff proved by the sheriff of the county, that by virtue of a writ of attachment issued from the district court of Des Moines county, in a suit therein pending, wherein Bernheimer Brothers were plaintiffs, and Mandall Brothers were defendants, and which writ was produced and proved, and with the sheriff's return thereon, was given in evidence in the cause, he seized the goods in in the petition mentioned, and that this was the taking and carrying away complained of. The plaintiff gave in evidence, also, a bond of indemnity made by defendants to the sheriff, binding the said defendants to indemnify, and save harmless the said sheriff, against any loss he might sustain,

Edinger v. Henchler et al.

by reason of his levying said writ on the goods in the petition mentioned. He further proved by the sheriff, that the bond was given to induce him, as such sheriff, to levy said writ of attachment on the goods aforesaid, and that he did accordingly seize the goods in the possession of plaintiff, and remove the same.

The plaintiff having rested his case, the defendants offered in evidence all the other papers in the original suit of Bernheimer Brothers v. Mandall Brothers, including the notice, petition, affidavit for attachment, and notes and accounts sued on; to the introduction of which in evidence, the plaintiff objected, that there was no evidence of the genuineness of said notes and accounts, and that there was no other evidence of any indebtedness from Mandall Brothers to said Bernheimer Brothers. The objection was overruled, and the papers aforesaid allowed to be given in evidence to the jury. A judgment by default had been claimed by the plaintiff, in the suit of Bernheimer Brothers v. Mandall Brothers, before the papers in said suit were offered in evidence.

The plaintiff asked the court to instruct the jury, that "the notes, accounts, and papers in the suit of Bernheimer Brothers v. Mandall Brothers, not being proved, are not evidence in this suit, of an indebtedness between the parties thereto." The instruction was refused, and there was verdict and judgment for the defendants, from which the plaintiff appeals.

D. Rorer, and Crocker & Smyth, for the appellant.

Browning & Tracy, for the appellees.

STOCKTON, J.—The papers offered by defendants, were prima facie evidence of an indebtedness existing from Mandall Brothers to Bernheimer Brothers, and so far as that fact was relevant, were proper to be given in evidence. The only objection to them was, that they did not prove an indebtedness. The objection was not that they tended to

Saunders v. Bentley.

prove a justification for defendants in a suit where they had not pleaded property in themselves, or in another.

The instruction asked, it seems to us, was irrelevant. As between the plaintiff and the defendants, in this suit, it was wholly immaterial, whether Mandall Brothers were or were not indebted to Bernheimer Brothers, in the suit instituted by the latter against the former. The defendants did not seek to justify the taking of the goods on any such ground. The question at issue related to the property in the goods by plaintiff, and the taking thereof by the defendants. Any evidence, therefore, not confined to these issues, was immaterial and irrelevant. If irrelevant evidence had been admitted, which tended to prejudice the plaintiff's cause, the judgment should be reversed; otherwise, not. As at present advised, we do not see how the testimony, even if admitted to be improper, could have operated to defendants' prejudice. The record does not show for what purpose it was offered, and as no material error is shown, the judgment will be affirmed.

Judgment affirmed.

110 gg

SAUNDERS v. BENTLEY.

In an action against two persons alleged to be partners, on a contract signed in the partnership name, service upon one is a service upon the partnership, and sufficient as to each member of the firm.

Appeal from the Henry District Court.

SATURDAY, JUNE 11.

This action was commenced against James Craig and George W. Bentley, and claims that they were partners by the name and style of Craig & Bentley, and as such, with one Burris, made their promissory note to plaintiffs. The

The County of Louisa v. Davison.

notice was returnable to the April term, 1858, and was served on Craig in March, of that year. The record also shows that the same notice was served on Bentley, in May, afterwards. Bentley made default. Craig answered, setting up, among other things, that the note sued on never was executed by the firm, or by any person authorized to sign their name. The cause was heard at the August term, 1858, and judgment rendered against Bentley by default, and in favor of Craig. Bentley appeals.

Hall, Harrington & Hall, for the appellant.

A. H. Bereman, for the appellant.

WRIGHT, C. J.—The error assigned is, that Bentley never was served, and that the court below had no jurisdiction over his person, so as to render judgment against him by default. Service upon Craig, (and this was unquestionably good), was a service upon the partnership; and hence, sufficient as to each member of the firm. Code, section 1728. By this service, the court obtained jurisdiction over Bentley, as well as Craig, and it was not lessened, or taken away, by the subsequent unnecessary reading of the same notice by the sheriff to Bentley.

Judgment affirmed.

THE COUNTY OF LOUISA v. DAVISON.

Where a tax is levied by a county judge, under section 31 of the act entitled "an act for the public instruction of the state," approved March 12, 1858, for the support of schools within the county, the county treasurer may lawfully collect the same.

Appeal from the Louisa District Court.

SATURDAY, JUNE 11.

The County of Louisa v. Davison.

A CASE SUBMITTED BY AGREEMENT. The agreement, properly signed and sworn to, is as follows:

Whereas, the treasurer of Louisa county, and one Mark Davison, are parties to a question in difference in reference to the collection of the school tax, levied under, and by virtue of the act of the general assembly, entitled "An act for the public instruction of the state of Iowa," approved March 12th, 1858, which might be the subject of a civil action; and whereas, both parties, in good faith, are desirous to present such question in difference to the district court of Louisa county, saving the right to either party to appeal from the judgment of the district court, under and upon the question hereinafter presented, to the supreme court of the state of Iowa. The county of Louisa, therefore, as plaintiff, and Mark Davison, as defendant, agree to present the following question to the district court of Louisa county. viz: Do the laws of the state of Iowa, enacted by the general assembly and the board of education, legally authorize the collection of the school tax, assessed and levied under the act of the general assembly, entitled "An act for the public instruction of the state of Iowa," approved March, 12th, 1858? If the court decide said question in the affirmative, the defendant agrees to submit to a judgment in favor of the county of Louisa, for \$25 98, that sum being the amount of school tax assessed and levied upon the property of said defendant in Louisa county, under the act of the general assembly, approved March 12, 1858. If the court decide said question in the negative, the county of Louisa agrees to submit to a judgment in favor of defendant for costs.

Judgment was rendered in favor of the plaintiff, and the defendant appeals.

B. F. Wright, for the appellant.

Joshua H. Tracy, (District Attorney), for the appellee.

Best v. Dean.

STOCKTON, J.—The question presented for our consideration is, whether the county authorities may lawfully collect a school tax, levied under the act of the general assembly of the state of Iowa, approved March 12th, 1858, entitled "An act for the public instruction of the state of Iowa." We understand, from the agreed statement of facts, that the tax referred to is that levied by the county judge, under section 31 of the act, for the support of schools within the county.

As no question is made as to the regularity of the proceedings prior to the levy of the tax, and as those provisions of the law which authorize the levying of taxes, whether for school district or county purposes, have been by this court held to be constitutional and valid, we have no doubt of the power of the county judge, under the section above referred to, to levy a tax for the support of schools within his county, nor of the authority of the county treasurer to collect the same.

As the agreed statement of the parties, does not present a case in which the question legitimately arises, as to the legality or validity of a tax levied under section ten, by the electors of any school district, or under subdivision twenty-one of section thirty, by the county judge, the question of the right of the treasurer to collect any such tax, is not decided.

Judgment affirmed.



BEST v. DEAN.

Section 1811 of the Code, does not apply to cases appealed from justices of the peace, by the party against whom judgment is rendered, and where, upon trial in the district court, the judgment rendered against the appellant, is less than that rendered by the justice.

Where a defendant appeals from a judgment rendered by a justice of the peace, and the plaintiff in the district court, recovers a less judgBest v. Dean.

ment than was rendered by the justice, he is entitled to recover the costs made subsequent to the appeal.

Appeal from the Lee District Court.

SATURDAY, JUNE 11.

In an action commenced before a justice of the peace, upon an account for work and labor done, plaintiff recovered judgment in the sum of thirty-nine dollars and fifty cents, and from this judgment defendant appealed to the district court. In that court, plaintiff recovered judgment for twenty-one dollars and fifty cents, and the costs before the justice, and he was required to pay the costs made subsequent to the appeal. Plaintiff appeals.

F. Semple, for the appellant.

J. M. Beck, for the appellee.

WRIGHT, C. J.—The only question in this case is, whether the plaintiff, having recovered a less amount in the district court than before the justice, was entitled to recover, also, the costs made subsequent to the appeal. Of this, there is no fair room for doubt.

Section 2345 of the Code, has reference to a case where, the party recovering the judgment before the justice, appeals; and if not more successful on appeal, than in the justice's court, he must pay the costs of the appeal. If the party against whom the judgment is rendered by the justice, appeals, and he desires to avoid the costs of the appeal, in the event that the appellee shall still recover some amount, he, (the appellant), must proffer to pay a certain amount, with costs, as contemplated by section 2546, and should the appellee recover less than the amount so proffered, he must pay the costs of appeal.

Section 1811 of the Code, was not intended to meet such a case as this. Powell v. Western Stage Co., 2 Iowa, 50.

Judgment reversed.

King v Kinuey.

KING v. KINNEY.

Where it does not appear that the district court has improperly exercised the discretion vested in it, in refusing to set aside a judgment by default, the judgment must be affirmed.

Appeal from the Dubuque District Court.

SATURDAY, JUNE 11.

The docket fee, on the appeal from the justice, not having been paid, the plaintiff moved the court to affirm the judgment; and the court being satisfied in the premises, affirmed the judgment, in accordance with a rule of court. Afterwards, on the application of the defendant, sustained by affidavit, the court set aside the judgment of affirmance, the defendant paid the docket fee, and the cause was moved to be continued until the next term of court. This was on the 29th of June. On the subsequent 24th of July, the court on the application of the plaintiff, set aside the order of continuance entered in the cause, vacated the order setting aside the judgment of affirmance, and again affirmed the judgment of the justice. From this latter order and judgment of the district court, the defendant appeals.

Samuels, Allison & Crane, for the appellant.

H. T. Utley, for the appellee.

Stockton, J.—It appears, that upon the application of the plaintiff to the court, to vacate the order by which the judgment of affirmance was rendered, the court heard the statements of the plaintiff and his attorney. These statements are not embodied in the record, and it is not in our power to say, that they were insufficient to justify the action of the district court. They must be taken to have been sufficient, as the contrary is not made to appear. The court had the power to vacate the order, at any time during the term. (Code, section 1579), and, when vacated, the cause stood Vol. VIII.—66

Cherry, Guardian, v. McCorkle.

upon the defendant's motion, sustained by his affidavits, to set aside the judgment by default. As it does not appear to us, that the district court improperly exercised the discretion vested in it, in refusing to set aside the judgment by default, upon the affidavit filed, the judgment of the district court is affirmed.

CHERRY, Guardian, v. McCorkle.

The rule excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs; and this rule has not been changed by the Code.

Appeal from the Lee District Court.

SATURDAY, JUNE 11.

CHERRY, as guardian of Samuel Anderson, claimed one hundred dollars, "as a balance due on a note, which was given up by plaintiff to defendant, through mistake, upon agreement that if the mistake existed, it should be rectified." On the trial in the district court, the plaintiff, Cherry, was offered, as a general witness, to prove the cause of action. Defendant objected, the objection was sustained, and judgment being rendered against plaintiff, he appeals.

F. Semple, for the appellant.

J. M. Beck, for the appellee.

WRIGHT, C. J.—The witness was incompetent. The rule excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs. Such is the case of a prochein ami, a guardian, an executor or administrator, and so also of trustees, and the officers of corporations, whether

The State of lows v. Crogan.

public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for reimbursement out of the public or trust funds. 1 Greenleaf Ev., sects. 347, 401 and 402; Sears v. Dillingham, 12 Mass., 360; Bellamy v. Cains, 3 Rich., 364. The Code has not changed this rule; but, on the contrary, has expressly provided, that though a minor may sue by guardian, such guardian shall be responsible for the costs of the suit. Section 1688.

Judgment affirmed.

8 528 103 111 8 528

THE STATE OF IOWA v. CROGAN.

Under section 2721 of the Code, which prohibits the keeping of gambling houses, the offense is as complete, if the house is kept for that purpose for one day, as if kept for a year.

To show that the place charged is kept as a gambling house, within the meaning of section 2721 of the Code, it may be shown that it was thus used continuously, but it is not necessary to charge such use in the indictment.

In an indictment for keeping a gambling house, it is not necessary to state the location of the house kept, further than to show the proper venue; but where the indictment alleges that the building is situate on a particular lot, the proof must sustain the allegation.

Where the place is stated in an indictment, as a matter of local description, and not as venue, it is necessary to prove it as laid.

Appeal from the Linn District Court.

SATURDAY, JUNE 11.

The indictment charges that the defendant did, on, &c., at, &c., keep a grocery building, situated on lot, (describing the lot), resorted to by divers persons, for the purpose of gambling, contrary, &c. To this indictment there was a demurrer, upon the ground that it did not show a continued keeping for the purpose alleged. This was overruled, and on the trial, the defendant asked the court to instruct the jury,

The State of Iowa v. Crogan.

that the situation of the premises must be proved as laid, and if not thus proved, they must acquit. The instruction was refused, and defendant convicted, from which he appeals.

D. M. McIntreh, for the appellant.

S. A. Rice, (Att'y General), for the state.

WRIGHT, C. J.—The language of the statute is, that "if any person keep a house, chop, or place, resorted to for the purpose of gampling," he shall be punished, &c. The offense is as complete if the house is kept for one day, as if kept for a year. The prosecution is not for causing or continuing a public or common nuisance, nor is the proceeding against the house as such, as contemplated by chapter 150 of the Code. To show that the place kept is a gambling house, within the meaning of the statute, (sec. 2721), it may be shown that it was thus used continuously, but it is not necessary to charge such use.

In some instances, where the place is stated in the indictment as a matter of local description, and not as venue, it is necessary to prove it as laid, although it need not have been stated, and the case before us is one of this class. Roscoe's Cr. Ev., 110-11; Warton's Cr. Law, 280; People v. Slater, 5 Hill, 401; same v. Honeyman, 3 Denio, 121; Shaw v. Wrigley, 2 East., 500; 2 Stark. Ev., 1571; 2 Russ. 100-1. Thus, it is said, that in an indictment for stealing in the dwelling house, &c., for burglary, or the like, if there be the slightest variance between the indictment and the evidence, in the name of the parish or place where the house is situated, or in any other description given of it, the defendant must be acquitted. And in an indictment for a nuisance for erecting a wier, if it be described as being at H., and be found to be at the lower part of the same water at T., the error is material. 2 East., supra.

In this case, it was not necessary for the pleader to have

The State of Iowa v. Johnson.

stated the location of the house kept, further than to show the proper venue. Having alleged, as a matter of local description, that it was upon a particular lot, the proof should have sustained the allegation. The instruction should have been given.

Judgment reversed.

THE STATE OF IOWA v. JOHNSON.

An instruction on the trial of an indictment for murder, which omits the element of premeditation, in defining the crime of murder of the first degree, is erroneous.

Fouts v. The State, 4 G. Greene, 500, commented on and overruled.

Where on the trial of an indictment for murder, the court charged the jury as follows: "If you are satisfied from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree;" and where the bill of exceptions recited that the other instructions pointed out the difference between murder of the first and second degree, and manslaughter, but the bill did not show what those instructions were; Held, That it did not appear from the record, that the defendant was not prejudiced, by the omission of the word "premeditated," in the said instruction.

Where on the trial of an indictment for murder, the counsel for the prisoner claimed and insisted that the defendant was not guilty, or if so, that the offense was murder of the first degree, and thereupon the court without objection, charged the jury as follows: "The form of your verdict will be as follows, if you find the defendant guilty: we, the jury, find the defendant guilty of murder in the first degree; or if you find the defendant not guilty, you will say, we find the defendant not guilty; Held, 1. That the defendant could not complain of the issue his counsel had presented. 2. That the instruction was not erroneous under the circumstances.

Where on the trial of an indictment for murder, the court, in relation to the dying declarations of the deceased, instructed the jury as follows: "If you receive them as true, it will be your duty to find the defendant guilty of murder in the first degree, because they show that it was done,

The State of Iowa v. Johnson.

either in the perpetration of, or attempt to perpetrate a, robbery;" and where the court, in response to an interrogatory of the jury, further held: "That if you should believe that the deceased was mistaken as to the object the defendant had in killing, (i. e., for his money), and that all the other declarations were true, and are satisfied, from the circumstances detailed by the testimony, that the murder was wilful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree. You can find a verdict of guilty of murder in the second degree, if the murder was wilful, and with malice aforethought, though not deliberate and premeditated, provided you are not satisfied that it was committed in the perpetration, or attempt to perpetrate a robbery. In inquiring into what was said by the deceased, on the subject of defendant's object in inflicting the wound, you may inquire whether he meant to say, that a robbery had been committed, or whether he referred to the intention of defendant in making the assault;" Held, That taking the instructions together, the first was not objectionable, or at least, not so much so as to alone justify a reversal of the cause.

Appeal from the Dubuque District Court.

SATURDAY, JUNE 11.

THE defendant was indicted, tried and convicted of the offense of murder in the first degree, in killing Adam Ostland. To reverse this conveition, he appeals, and assigns for error the giving of the following instructions:

First. "If you receive them, (the dying declarations), as true, it will be your duty to find the defendant guilty of murder in the first degree, because they show that it was done either in the perpetration or attempt to perpetrate a robbery."

Second. "The form of your verdict will be as follows, if you find the defendant guilty: We, the jury, find the defendant guilty of murder in the first degree; or if you find the defendant not guilty, you will say, we find the defendant not guilty."

Third. "If you are satisfied from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree." The other material facts appear in the opinion of the court.

The State of lowa v. Johnson.

O'Neill & McLenan, for the appellant.

S. A. Rice, (Att'y General), and W. T. Barker, for the state.

WRIGHT, C. J.—We gather from the record, that the testimony was made up of the defendant's confessions, the dying declarations of Ostland, and what was seen by the witnesses. The bill of exceptions recites also, that all of the instructions are not before us, and that in the portion omitted, "was contained the distinction between murder in the first, and murder in the second degree, and manslaughter; that on the trial it was contended and urged to the court and jury, by the counsel on both sides, that the verdict must, from the testimony and the law, be either murder in the first degree, or not guilty.

It is further shown, that the jury propounded this inquiry to the court: "If we should be of the opinion, that the deceased was mistaken in his dying declarations, as to the object defendant had in killing, (i. e., for his money), and that all other parts of it are true, could we bring in a verdict of guilty of murder in the second degree, or otherwise?" To this, the court said: "If you should believe that the deceased was mistaken upon the points stated in your question, and that all other parts of decedent's testimony are true, and are satisfied, from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforthought, the verdict should be for murder in the first degree. You can find a verdict of guilty of murder in the second degree, if the murder was willful, and with malice aforethought, though not deliberate and premeditated, provided you are not satisfied that it was committed in the perpetration, or attempt to perpetrate a In inquiring into what was said by the deceased on the subject of defendant's object in inflicting the wound. you may inquire whether he meant to say that a robbery

The State of Iowa v. Johnson.

had been committed, or whether he referred to the intention of the defendant in making the assault." In addition to the instruction objected to by the prisoner, on the subject of dying declarations, the jury were also told, that they would examine the circumstances under which they were made, and give them such weight as in their opinion they were entitled to, and that if they ought to be rejected, it was their province to do so.

The third instruction is erroneous, in that it omits the element of premeditation, in defining the crime of murder of the first degree. The language of the law is, that all nurder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, mayhem or burglary, is murder of the first degree, and shall be punished with death. Whoever commits murder otherwise than is set forth above, is guilty of murder of the second degree. The general definition of murder is, the killing of a human being, with malice aforethought, express or implied. Code, secs. 2568-9, 2570.

It will be seen that to constitute murder of the first degree, unless it is perpetrated by means of poison or lying in wait, or the perpetration, or attempt to perpetrate, some one of the crimes named, there must be willfulness, deliberation, and premeditation, on the part of the guilty agent. By this is meant, not that willfulness, deliberation and premeditation, might not, and would not, exist in the case of murder perpetrated by means of poison and lying in wait; or that they may not exist when committed in the perpetration or attempt to perpetrate the crimes named, but that in all the instances, except those enumerated by the statute, it must be willful, deliberate and premeditated. In murder of both degrees there must be malice aforethought, either express or implied; but to constitute murder of the second degree, it is not necessary that it should be wilful, deliberate and premeditated. Premeditation implies more than deliberation.

The State of Iowa v. Johnson.

To meditate, is to deliberate, but to premeditate, implies an act or state of the mind going before meditation or deliberation. It means to meditate or deliberate before concluding to do the deed; not alone to willfully take life, nor yet to do it deliberately, but to predetermine to contrive by previous meditation.

The statutes of Pennslyvania, New Hampshire, Michigan, New Jersey, Tennessee, Alabama and Virginia, use the same, or almost the same, language as ours, in defining murder in the first degree, so far as relates to the general definition. The enumerated or particular instances in which the party would be guilty in this degree, in those states, differ from ours, and from each other. By these statutes, murder, as limited by the common law, has been divided into two classes. The boundaries between murder and manslaughter remain unchanged. It has been held that these statutes, in requring murder in the first degree to be deliberate, did not change the common law in that respect. The distinctive peculiarity to constitute murder of the first degree is, that it shall be accompanied with a premeditated determination to take life. The killing must be premeditated. Of course, we refer to cases coming under the general language, rather than the enumerated instances of the statute. Wharton's Cr. Law, 494; Dale v. The State, 10 Yerger, 551; Respublica v. Mulatto Bob, 4 Dallas, 146; Commonwealth v. Jones, 1 Leigh, 612; Com. v. Green, 1 Ashmead, 289; State v. Spencer, 1 Zabriskie, 196; Stone v. The State, 4 Humphrey, 36; Kirkpatrick v. Com., 31 Penn. St., 108; Fouts v. The State, 4 G. Greene, 500.

The ruling in this last case, requiring that the indictment should designate the grade of the homicide, and that to convict of murder in the first degree, the killing should be charged to be willful, deliberate and premeditated, is opposed to the doctrine of the text in Wharton's Cr. Law, 509 and 483. And upon this subject, see the following cases: Mitchell v. The State, 5 Yerger, 340; Commonwealth v. Flanagan, 8 W. & Serg., 415; Commonwealth v. Vol. VIII.—67

The State of lows v. Johnson.

White, 6 Binney, 183; Commonwealth v. Miller, 1 Va. Cases, 310; Harris v. The State, 8 Humph., 597; McGee v. Tke State, 8 Miss., 495; State v. Drinkley, 3 Iredell, 117.

So, also, the tendency of the authorities, contrary to the holding in the same case, is that no specific length of time is required for the deliberation or premeditation. In one case, it is said that if the party killing had time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, willful and premeditated killing—constituting murder in the first degree. Commonwealth v. Smith, 7 Smiths Laws, 647; and see Davis v. The State, 2 Humph., 439.

In another it is held, that to constitute the crime of murder in the first degree, when the purpose to maliciously kill, with deliberation and premeditation, is formed, the length of time between the design so formed, and its execution, is immaterial. Shoemaker v. The State, 12 Stanton, 43.

In the case of *The State* v. Spencer, 1 Zabriskie, 196, it is said that the premeditation or intent to kill, need not be for a day, or an hour, nor even for a minute. For if the the jury believe there was a design and determination to kill, distinctly formed in the mind, at any moment before, or at the time the pistol was fired, or the blow was struck, it was a willful, deliberate, and premeditated killing, and therefore murder in the first degree.

And these cases, in our opinion, state the law correctly. Premeditation can have no defined limits, as to the time of its commencement before the killing. Every case must rest on its own circumstances, for it is impossible to furnish any safe and uniform standard in this particular. "Law, reason and common sense," says a learned judge in one case, "unite in declaring, that an apparently instantaneous act may be accompanied with such circumstances, as to leave no doubt of its being the result of premeditation." Commonwealth v. Daley, 4 Penn., L. J., 156.

It is suggested, however, that any possible error arising

The State of Iowa v. Johnson.

from the omission of the word "premeditated," in giving the third instruction, is obviated, from the fact that the court did in other instructions, not before us, point out "the distinction between murder of the first and second degree, and manslaughter." It is true, that the bill of exceptions recites, that this was done, but what the distinction was, as thus pointed out, we cannot know. For ought that appears, murder of the first degree, was defined as in this instruction. It may be, as claimed, that the element of premeditation was distinctly and clearly referred to in this part of the charge; and if it so appeared from the record, we might be fully justified in holding, taking all the instructions together, that there was no prejudice to the prisoner's cause from its omission in the third instruction. sence of such instructions, however, we cannot say that they contained sufficient to correct the manifest error in the one before us.

Instructions must always be considered with reference to the circumstances of the case in which they are given. The intention of the law is, that they should be adapted to the issue, and sufficient for the guidance of the jury, in the particular case on trial. Thus, in the case before us, the second instruction, under some circumstances, would be erroneous, while in this particular case it is without objection.

The counsel for the prisoner had claimed, and insisted, that he was not guilty, or, if so, the offense was murder of the first degree. Notwithstanding he thus claimed, he had the right, by proper instructions, to have the jury inquire whether it was not of the second degree, or manslaughter. If he made no such request, however, but permitted the instructions to be given, adapted to the issue as he made it, the prisoner cannot now complain. When it is said, as claimed in the argument, that a prisoner is not bound by any course of argument, or figure of speech, used by his counsel, the remark must be understood with some qualifications.

The State of Iowa v. Johsonn.

Neither he, nor his counsel, would be bound at all events, and for all purposes. But he is, as a general rule, bound in this court, by the line of policy adopted and pursued by his counsel in the court below. Thus, if his counsel did not introduce all his testimony; did not ask all the instructions he should have done for the benefit of his cause before the jury; did not present all the arguments, fairly and justly deducible from the testimony; did not object to the introduction of improper testimony, or except to improper instructions; in all these, and many other instances, the prisoner is concluded by the action, or want of action, of his So, if throughout the case, from the belief that the interest of his client required it, he steadily and persistently insists, that the crime is of the highest grade, or that his client is innocent—if, without objection, he permits all of the instructions to be given, and adapted to the positions assumed by him-the prisoner cannot, in this court, claim that the instructions do not contain all the law, or that they are not as full and explicit as they should have been, under other circumstances. In such a case, it is perfectly competent for the court to charge the jury, so as to cover other points than those made by counsel, and to give the prisoner the benefit of other legal rules and principles than those urged. It is not only competent to thus charge, but in many instances, as in this, it is felt to be a duty. yet, if omitted, we are aware of no precedent for holding it erroneous.

It is further to be remarked, in relation to the second instruction, that the jury were told, in answer to the interrogatory propounded, that they could find a verdict for murder in the second degree. And thus, it appears, that all reasonable chance for prejudice was removed, unless the court should also have told them that they could find the prisoner guilty of manslaughter. In addition to what is said above, as to the duty of the court in this respect, we may remark, that unlesss requested, the prisoner, in this case, cannot complain of the failure to thus instruct. He cannot,

The State of Iowa v. Williams.

for the sufficient reason, that there is no particle of testimony tending to show that the offense was of this grade. The prisoner was most clearly guilty of murder of the first or second degree, or of nothing.

Taking the first instruction, in connection with what was afterwards said, upon the subject of dying declarations, and we think it was not objectionable, or, at least, not so much so as to alone justify a reversal of the cause.

Judgment reversed.

THE STATE OF IOWA v. WILLIAMS.

An affidavit for a continuance, on the ground of the absence of a witness, which does not show that the facts expected to be proved by the witness, are material and relevant, nor that the defendant knows no other witness by whom the same facts can be so fully proved, is insufficient.

An indictment under section 2634 of the Code, for having in possession false money, or coin counterfeited in the similitude of coin current in the state of Iowa, &c., need not allege that the coin was counterfeited in the similitude of the current coin of the United States; nor is it necessary to aver that the counterfeit coin was of any value.

Under an indictment for having in possession false money, or coin counterfeited in the similitude of coin current in the state, &c., it is not necessary for the jury, by their verdict, to find more than that the defendant is guilty as charged in the indictment; and where they do more, and there is any valid objection to their finding, it may be rejected by the court, and judgment rendered on the verdict of guilty.

Appeal from the Lee District Court.

SATURDAY, JUNE 11.

THE defendant was indicted for unlawfully having in his possession, at the same time, twenty pieces of false money and coin, counterfeited in the similitude of silver coin, current by law and usage in the state of Iowa. The indictment averred, that of said false and counterfeit coin, ten

The State of lows v. Williams.

pieces were of the denomination of half dollars, and ten pieces were of the denomination of quarter dollars; that the said defendant knew at the time, that said coin was false and counterfeit; and that he had the same in his possession, with intent to utter and pass the same as true and current coin. The defendant demurred to the indictment, for the following reasons:

- 1. The indictment does not set forth, that defendant had in his possession, any coin in the similitude of coin of the United States.
- 2. The indictment does not describe any coin known to the laws of Iowa.
- 3. The indictment does not set forth the value of the coin counterfeited.
- 4. The indictment does not charge that defendant had the counterfeit coin, knowing the same to be counterfeit, and intending to pass the same, knowing the same to be counterfeit.

This demurrer was overruled, and the defendant pleaded not guilty. He then filed an affidavit for a continuance, alleging that he could not safely go to trial without the testimony of one R. Munn, who resides somewhere in the state of Illinois; that he expected to prove, by said witness, that at the Western hotel, in the city of Keokuk, he got a ten dollar gold piece changed, by a person there, who was a stranger to him; that at the time it was changed, he was under the influence of liquor; that the silver money which he got in change, was the identical money that was taken from him by the officers, when he was arrested; that he has been arrested about four weeks, and has been in prison ever since his arrest; that he has not been allowed to write to said Munn, since he was placed in jail; and that he believes he can obtain the deposition of said witness before the next term of court. The motion for a continuance was overruled. and the defendant being put upon his trial, the jury rendered a verdict as follows: "We, the jury, find the defendant guilty as charged in the indictment; and we find that

The State of lows v. Williams.

the defendant had in his possession at the time, thirteen pieces of false and counterfeit money, in the similitude of silver coin, current in the state of Iowa, knowing the same to be false and counterfeit, and with the intent to pass the same as true." The defendant was sentenced to the penitentiary for the term of ten years.

John M. Beck, for the appellant.

S. A. Rice, (Attorney General), for the state.

STOCKTON, J.—1. The motion for a continuance was properly overruled. The affidavit of defendant in support of the motion, did not make out a good cause for a continuance. It is not shown, that the facts expected to be proved by the witness, were material, or relevant; nor is it shown that defendant knew of no other witness, by whom the same facts could be fully proved. It was necessary for the defendant to connect the testimony, expected to be given by the absent witness, with the offense with which the defendant was charged.

The demurrer to the indictment was for the reason, That the same did hot set forth that defendant had in his possession, any coin counterfeited in the similitude of the current coin of the United States, and that the same does not describe any coin known to the laws of Iowa. Under our statute, the crime with which the defendant was charged, was that of "having in his possession, at the same time, pieces of false money, or coin counterfeited in the similitude of silver coin, current by law and usage in the state of Iowa, knowing the same to be false and counterfeit, and with intent to pass the same as true." Code, section 2634. It was sufficient, therefore, to charge the defendant in the language of the statute. If the coin was counterfeited in the similitude of coin current, by usage, in the state of Iowa, the offense is sufficiently described. It was not necessary to charge that the coin was counterfeited in the similitude of the current coin of the United States.

The State of Iowa v. Barrett.

- 3. It was not necessary that the indictment should charge that the counterfeit coin was of any value. It is sufficiently alleged, that ten of the pieces of counterfeit coin were of the denomination of half dollars, and a like number of the denomination of quarter dollars.
- 4. We think it is sufficiently alleged, that the defendant had the counterfeit coin in his possession, knowing the same to be counterfeit, and intending to pass the same as true coin.
- The defendant further assigns for error, that the ver-5. dict of the jury was not such as to authorize the judgment of the court, and that it does not show the defendant guilty of any crime known to the laws of Iowa. The jury found "the defendant guilty, as charged in the indictment, and that he had in his possession, at the time, thirteen pieces of false and counterfeit money, in the similitude of silver coin, current in the state of Iowa, knowing the same to be false and counterfeit, and with intent to pass the same as true." It was not necessary for the jury, by their verdict, to find more than that the defendant was guilty, as charged in the indictment. If there was any valid objection to the remainder of their finding, it was in the discretion of the court to reject the same, and render judgment on the verdict of guilty.

Judgment affirmed.

THE STATE OF IOWA v. BARRETT.

An indictment for uttering, as true, a counterfelt bank bill, under section 2627 of the Code, need not allege an intention to defraud any particular person.

An indictment which charges the defendant with uttering, passing, and tendering in payment, a counterfeit bank bill, with intent to defraud, &c., does not charge more than one public offense, and is not in violation of section 2917 of the Code.

Where there is nothing to show that the district court has not abused the

8 536 95 493 8 536

The State of Iowa v. Barrett.

discretion conferred upon that court, by section 3272 of the Code, in refusing to grant a change of venue, the appellate court cannot interfere.

Where an affidavit for a continuance in a criminal case, on the ground of the absence of witnesses, fully complies with the requirements of section 1766 of the Code, the continuance should be granted; and the fact that the absent witnesses reside out of the state, furnishes no reason for refusing the continuance.

Where on the trial of an indictment for uttering a counterfeit bank bill, &c., the defendant objected to the bill offered in evidence, on the ground of variance in the name of the president; and the court, upon inspection, decided that it could not determine that there was a variance, and permitted the bill to be read to the jury; *Held*, That there was nothing to show that a variance existed of such a character as to exclude the bill from the jury.

Appeal from the Johnson District Court.

SATURDAY, JUNE 11.

Indictment for passing a counterfeit bank bill. The indictment charged that the defendant, on the 23d day of November, 1857, at, &c., to one Arthur W. Briggs, feloniously, willfully and unlawfully, did utter, pass, and tender in payment as true, a certain false, forged, and counterfeited bank bill, purporting to be a bank bill for the sum of ten dollars, issued by the Bank of Commerce, a corporation duly authorized for that purpose, by the state of Ohio, (setting out a copy of the bill), the said defendant then and there well knowing the said bank bill to be false, forged and counterfeit, with intent to injure and defraud. The defendant demurred to the indictment, assigning as causes thereof, that the indictment charged more than one offense in the same count, and that it was uncertain as to the person intended to be defrauded. The demurrer was overruled, and the defendant filed a plea of not guilty.

The defendant then filed an affidavit for a continuance, on the ground of the absence of witnesses, setting forth the facts he expected to prove by the said witnesses, and that a portion of them resided in Rock Island county, Illinois, which motion was overruled. An affidavit for a change of venue, Vol. VIII.—68

The State of Iowa v. Barrett.

on the ground of the prejudice of the judge of the district court, was also filed and overruled.

On the trial, as appears from the bill of exceptions, the state offered in evidence a bank bill, to which the defendant objected, on the ground that there was a variance between the bill offered and that described in the indictment, in the name of the president. After inspecting it, the court was unable to determine the name of the president, written on said bill, but upon comparing the bill with the copy set out in the indictment, said the name of the president written on the bill might be read Parker Handy, the name alleged in the indictment, and could not say there was a variance. The court permitted the bill to be read in evidence to the jury. The jury returned a verdict of guilty—a motion to set aside the verdict, and in arrest of judgment, was overruled—and the defendant sentenced to the penitentiary for three years, from which judgment he appeals.

Templin & Fairall, for the appellant.

S. A. Rice, (Attorney General), for the state.

WRIGHT, C. J.—It is charged in the indictment, that the defendant did utter, pass, and tender in payment, &c., a certain false, forged, and counterfeit bank bill, &c., with intent to injure and defraud, &c. The defendant, by his demurrer, claims that the indictment is bad, for the reason that it fails to charge an intention to defraud any particular person. In this respect, the indictment is sufficient. Code, sec. 2928; The State v. Pierce, ante 231; The State v. Callendine, ante 288.

Nor is the indictment subject to the objection, that it charges more than one public offense, in violation of section 2917 of the Code. We are not aware that under any statute it has ever been held, that to charge a party with uttering, passing, and tendering in payment, counterfeit money,

The State of Iows v. Barrett.

violated the rule contended for by appellant. The State v. McPherson, decided at this term.

We see no reason for interfering with the discretion lodged with the district court, under section 3272 of the Code, in refusing the change of venue asked for by the defendant. There is nothing to show that the court below exercised any other than a sound discretion under the circumstances. If the discretion given is not abused, we cannot control it. *The State* v. *Gordon*, 3 Iowa, 410.

The continuance asked for, should have been granted. The prisoner was indicted on the 6th, and on the 10th of the same month, made his affidavit, fully complying in every particular, with the requirements of section 1766 of the Code. Under such circumstances, it was error to refuse the continuance. Welsh v. Savery, 4 Iowa, 241; The State v. Nash & Redout, 7 Iowa, 347. That the witnesses redded out of the state, could make no difference, as by chipter 191, the defendant had the right to procure their testimony, on a commission to be issued as therein directed

As to the charge of the court upon the subject of proving the existence of the bank, or corporation, by which he bill purported to be issued, we refer to the case of *The State* v. *Newland*, 7 Iowa, 242. In that case, there was no evidence of the existence of the bank, by the charter, reputation, or otherwise. In this, we infer from the instructions, that there was proof of some kind—its sufficiency being denied. The cases in this respect, therefore, are materially different.

We understand that the court determined, that there was no variance between the bill offered in evidence, and the one described in the indictment. It is true, that the bill of exceptions recites, that there was difficulty in determining the question, but finally it is said, "that the court could not say there was a variance, and permitted the bill to be read." There is nothing to show that a variance existed, of such a character as to exclude the bill when offered in testimony.

As the case must be remanded, for the error in refusing

The State of Iows v. Bond.

the continuance, and as the other questions made are not of general importance, and may not arise upon the second trial, we deem it unnecessary to dispose of them.

Judgment reversed.

THE STATE OF IOWA v. BOND.

Where under an indictment for larceny, in which the defendant was charged, among other things, with taking certain promissory notes, for the payment of money, commonly called bank notes, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of larceny in taking the money in the indictment mentioned, and fix the amount and value of the same at \$127.80;" Held, That the verdict was sufficiently formal.

In an indictment for larceny, in stealing a bank note, it is sufficient to describe it as a promissory note, for the payment of money, commonly called a bank note, purporting to be issued by a bank, (naming it), for the payment of a certain sum of money, still due and unpaid, and of a certain value.

Bank notes are made the subject of larceny, by the statutes of the state of lows.

Where under an indictment for larceny, in which the defendant was charged with stealing certain money and bank notes, the court instructed the jury as follows: "That if a man, under the honest impression that he has title to the property, takes it into his possession, it is not larceny; but if there be an act of concealment, it indicates a knowledge that his claim is unfounded. If the circumstances show that the defendant acted in good faith, under a claim of title in himself, he is exempt from the charge of larceny, although his claim has no foundation in right. The cases in which this principle has been settled, have been those in which property other than money, was the subject of the taking, and where a title to the specific article was set up. It will be necessary for us to inquire how far the principle will apply, where money is taken. No claim of title to the particular money taken, is alleged to have been set up; but the claim was, that the amount taken was due in services. If the claim had been asserted to C. & R., (the persons from whom the property was taken), before the time of the taking, and there was no evidence of concealment, the fact that money was taken, would not vary the principle. It would not be larceny. If the jury are satis-

The State of Iowa v. Bond.

fied, from the testimony, that the defendant was in the employment of C. & R.; that there was nothing due him for services; that he secretly took this money, belonging to them, and from their money-drawer, with the intention to keep it, and convert it to his own use; and that he made the entries in the books, and placed the letter, setting up a claim for services, in them, intending to leave the state, and further intending that the books and entries should not be discovered until after he left the state, it will be your duty to find him guilty. If the jury believe from the testimony, that the defendant took the money on Saturday, and at a time when, in the ordinary course in which the business of C. & R. was conducted, the taking would not be discovered until Monday morning, and that defendant intended to leave on Saturday, and intended that the letter which he left in the books, should not be discovered until after his departure, it will be your duty to find him guilty;" Held, That the instructions were sufficiently favorable to the defendant.

Appeal from the Dubuque District Court.

SATURDAY, JUNE 11.

INDICTMENT FOR LARCENY. The property alleged to have been stolen is described in the indictment as follows: "One watch, of the value of five dollars; one silver coin, of the value of twenty cents; one five dollar gold piece, of coinage of the United States, of the value of five dollars; one promissory note, for the payment of money, commonly called a bank note, purporting to be issued by the St. Croix Valley Bank, for the payment of ten dollars, being still due and unpaid, of the value of ten dollars," and other bank notes described in like manner.

The defendant was convicted, and a motion to set aside the verdict, and in arrest of judgment, having been overruled, he was sentenced to six months imprisonment in the penitentiary, from which judgment he appeals. The other material facts, and the questions raised, are sufficiently stated in the opinion of the court.

B. M. Samuels and O'Niel & McLenan, for the appellant, cited 3 Binney, 533; 1 How. (Miss.), 262; 2 Russell on

The State of Iowa v. Bond.

Crimes, 71; 1 Porter, 33; Rev v. Craven, R. & R., 14; 2 East., 10; N. Y. Fire Ins. Co. v. Walden, 12 Johns., 513; Davies v. Pierce, 2 Tenn., 53; Aylvin v. Ulmer, 12 Mass., 22; Tufts v. Seabury, 11 Pick., 140; Ib., 398; Fisher v. Duncan, 1 Hen. & Munf., 563; 2 Hawks, 68.

S. A. Rice, (Attorney General), and W. T. Barker, (District Attorney), for the state, relied on Munson v. The State, 4 G. Greene, 483; Winfield v. The State, 3 Ib., 339; Code, 3054; Ib., 2916.

STOCKTON, J.—I. The motion in arrest of judgment was for the reason; 1. That the verdict was informal and defective, in that it does not find the defendant guilty, as charged in the indictment. The verdict of the jury was, "We, the jury, find the defendant guilty of larceny, in taking the money in the indictment mentioned, and fix the amount and value of the same at \$127 80." This verdict, we think, is sufficiently formal. Its meaning can hardly be misunderstood. The property charged to have been stolen, consisted of a watch, one piece of silver coin, one piece of gold coin, and a quanty of bank notes, and alleged to be of certain value. The verdict is the same as if the jury had said, that they found the defendant guilty as charged in the indictment, and found the value of the property stolen to be \$127 80.

II. The second ground of the motion was, that "the indictment was defective, in that it does not aver the taking of any bank note, or notes." We think it was sufficient to describe the property taken as "a promissory note for the payment of money, commonly called a bank note, purporting to be issued by the bank for the payment of ten dollars, still due and unpaid, and of the value of," &c.

The cases cited by the defendant do not hold any different doctrine. In the case of *Damewood* v. *The State*, 1 How. (Miss.), 262, it was held not sufficient to describe the bank note as a promissory note for the payment of money,

The State of Iowa v. Bond.

without further describing it as "a promissory note for the payment of money, commonly called a bank note." in the case of Spangler v. The Commonwealth, 3 Binney, 533, it was held that an indictment for stealing bank notes generally, under the description of "promissory notes for the payment of money," was bad. It should appear, (say the court), that the notes were issued by a bank incorporated by law; or the bank should be named, with an averment that it was incorporated; or it should be shown in some sufficient manner, that the notes were lawful. 3 Binney, 536. The court place the decision on the ground that in Pennsylvania, the notes of unincorporated banks, were not the subject of larceny. There is no such provision of law in this state; and the question being, whether the property mentioned in the indictment, is made the subject of larceny by the statute, we are of opinion that it is, and that the description given is sufficient. The People v. Holbrook, 13 Johns., 90; The People v. Johnson, 8 Barb., 637; Wharton's Crim. Law, 178-180.

The court charged the jury, "that if a man, under the honest impression that he has a title to property, takes it into his possession, it is not larceny; but if there be an act of concealment, it indicates a knowledge that his claim is unfounded. If the circumstances show that the defendant acted in good faith, under a claim of title in himself, he is exempt from the charge of larceny, although his claim has no foundation in right. The cases in which this principle has been settled, have been those in which property other than money, was the subject of the taking, and where a title to the specific article was set up. It will be necessary for us to inquire, how far the principle will apply, where money is taken. No claim of title to the particular money taken, is alleged to have been set up; but the claim was, that the amount taken was due for services. If the claim had been asserted to Coffal and Rossister, before the time of the taking, and there had been no concealment, the fact

that money was taken, would not vary the principle. would not be larceny. If the jury are satisfied from the testimony, that the defendant was in the employment of Coffal and Rossister; that there was nothing due him for services; that he secretly took this money, belonging to them, and from their money drawer, with the intention to keep it, and convert is to his own use; and that he made the entries in the books, and placed the letter setting up a claim for services in them, intending to leave the state, and further intending that the books and entries should not be discovered until after he left the state, it will be your duty to find him guilty. If the jury believe from the testimony, that the defendant took the money on Saturday, and at a time when in the ordinary course in which the business of Coffal and Rossister was conducted, the taking would not be discovered until Monday morning, and that the defendant intended to leave on Saturday, and intended that the letter which he left in the books, should not be discovered until after his departure, it will be your duty to find him guilty."

The objection taken by the defendant to the charge of the court, cannot be sustained. Looking at the whole charge, we think it as favorable to the defendant as he had any reason to require.

Judgment affirmed.

8 544 88 486

PICKEBELL v. CARSON.

The proper construction of an instrument of writing, and the meaning of the words used, is to be determined by the court.

The word "fixtures" and "appurtenances" have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context, and to the connection in which the words are used.

Replevin. On the 30th of October, 1856, F. M. P., one of the plaintiffs,

being indebted to to the defendant, in the sum of \$2,500, by an instrument of writing of that date, and to secure the payment of said sum, did "sell and convey unto the said defendant, the following described premises, to-wit: all the fixtures and appurtenances contained in the daguerrean rooms on Main street, Dubuque, belonging to the said F. M. P. No schedule of the property was attached to the conveyance. On the 12th of January, 1857, F. M. P. sold and conveyed by bill of salc, to O. F. P., the other plaintiff, for the alleged consideration of \$2,000, all the daguerreotype material, stock, cameras, picture frames, paintings, furniture, one piano forte, carpet on floor, improvements and looking glass, together with the lease on the gallery, and all and singular every article in any wise appertaining to the business contained in the National Daguerreotype Gallery in Dubuque, Iowa; Held, 1. That the word appurtenances in the bill of sale to defendant, embraced the loose moveable articles of personal property, in the daguerrean rooms, so far as they were necessary to the business carried on therein; 2. That under the term "fixtures," all the right and interest of F. M. P. in and to the sky-light, balcony, partition, and all other property annexed to the premises, passed to the defendant under the said bill of sale.

Fixtures are personal chattels annexed to the freehold, and which may be severed and removed by the party who has annexed them, against the will of the owner of the freehold.

Appurtenances signify something belonging to another thing as principals and which passes as incident to the principal thing.

Appeal from the Dubuque District Court.

SATURDAY, JUNE 11.

The plaintiffs were carrying on the dagnerrean business at the city of Dubuque, on the premises known as the "Pickerell Dagnerrean Room." There was connected with the rooms, a valuable sky-light, and a balcony running along one side, by which an entrance was gained to the rooms; and there were partitions in said rooms, and other fixtures for the convenience of trade, erected by F. M. Pickerell, one of the plaintiffs, who alone held the lease-hold interest of the premises. The plaintiffs had a large amount of property in their possession, in their said dagnerrean rooms, consisting of cameras, camera boxes, stands, head rests, operating chairs, chemicals, pictures, picture frames, maps, Vol. VIII.—69

Digitized by Google

furniture and stock in trade, and one piano, the whole valued by them at the sum of two thousand dollars. was no evidence to show that any of this property, last mentioned, was attached to or fastened to the premises or

realty.

On the 30th of October, 1856, F. M. Pickerell, one of the plaintiffs, being indebted to the defendant in the sum of twenty-five hundred dollars, by an instrument of writing of that date, and to secure the payment of said sum, did "sell and convey to said William C. Carson, the following described premises, to-wit: all the fixtures and appurtenances contained in the daguerrean rooms," in the building on Main street, Dubuque, belonging to Frank M. Pickerell." There was no schedule of the property, or inventory of any kind, attached to said instrument of writing.

On the 12th of January, 1857, F. M. Pickerell sold and conveyed, by bill of sale, to his co-plaintiff, O. F. Pickerell, for the alleged consideration of two thousand dollars, "all the daguerreotype material, stock, cameras, picture frames, paintings, furniture, one piano forte, carpet on floor, improvements, and looking-glass, together with the lease on the gallery, and all and singular, every article in any wise appertaining to the business contained in the National Daguerreotype Gallery, in Dubuque, Iowa."

The property remained in the possession of the plaintiffs until January 31st, 1857, when it was taken from them by the defendant; whereupon the plaintiffs brought this action of replevin, to recover possession of the same. The defendant claimed the title and possession under the mortgage from F. M. Pickerell to himself, above recited.

The court charged the jury, that "the words (fixtures and appurtenances), used in the conveyance by F. M. Pickerell. to defendant, included the appurtenances contained in a daguerrean room, and such as were contained in the particular rooms described in the petition; that they included such things as pertained or belonged to the room described, and such things as were used by F. M. Pickerell in that room.

in carrying on the daguerrean business, and which remained there permanently; that they included furniture permanently used in that particular business; that the word "fixtures" was not synonymous with "appurtenances;" that fixture meant something fixed to the realty;" and that the jury might consider the word appurtenances as including all pictures hanging on the wall, together with the stove and carpet, they being attached to the room, and the maps upon the wall, with the apparatus and furniture necessary for a daguerrean room, the machines and stock, oils and mercury, and all things used in carrying on the business." To this portion of the charge of the court, the plaintiffs excepted.

The plaintiffs asked the court to instruct the jury, that "loose, moveable articles of personal property, will not be regarded as fixtures, or appurtenances." The court refused to give the instruction as asked by plaintiffs, but after striking out therefrom the word "appurtenances," gave the remainder of the instruction. The plaintiffs also asked the court to instruct the jury, that, "if, by the terms 'fixtures and appurtenances,' the title to such property as that mentioned in the petition, does not pass, the jury must find for the plaintiff." This instruction the court refused to give. There was a verdict for the defendant, in the sum of nineteen hundred and eighty-six dollars, for which judgment was rendered. The plaintiffs appeal.

Wiltse, Friend & Jennings, for the appellants.

The question for the court is, whether the mortgagee, (the defendant), is entitled to the articles of personal property, seized by him under pretence that they were covered by his mortgage, which property is fully set out in a schedule attached to the petition. Or, in other words, whether by the terms, "fixtures and appurtenances," the loose, moveable articles, named in said schedule pass to the mortgagee.

The terms, "fixtures and appurtenances," are technical, and are to be construed accordingly. Code of Iowa, section

26. It cannot be gathered, from the agreement contained in the mortgage, that it was the intention of the mortgagee to take a pledge of personal property; nor is there, in fact, in the agreement anything to vary the general rule of law, as applying to fixtures and appurtenances. It is the "fixtures and appurtenances contained in the daguerrean rooms." But the language is that of a grant—"hereby sell and convey," say the grantors. Nor is there any evidence, or otherwise, outside of the agreement, to show that any thing was included or meant, but what may and does pass under the technical designation of fixtures and appurtenances.

We are brought, then, to the legal meaning of fixtures and appurtenances. "The term fixtures is always applied to articles of a personal nature, which have been affixed to Amos & Ferard on Fixtures, 1. "It is not enough that it has been laid upon the land, and brought into contact with it; the definition requires something more than mere juxtaposition." Ib., 2. "The annexation must be actual, or constructive; by actual, is understood every mode by which a chattel may be joined or united to the freehold. The article must not, however, be laid upon the ground; it must be fastened, fixed, or set into the land," &c. Under constructive annexation, is ranked, deeds, and other chattels, relating to the title to the inheritance;" but loose moveable machinery, not attached nor affixed, which is used in prosecuting any business, to which the freehold is adapted, is not considered as an appurtenance." 1 Bouvier's Law Dictionary, 529. The general rule is, that fixtures once annexed to the freehold, become a part of the realty; but there is an exception-" where it has been annexed for the purpose of carrying on a trade." Ib., 529. Wherever the general rule, as to fixtures, has not been changed by statute, as has been the case in Pennsylvania, and perhaps elsewhere, it will be found that the rulings follow the definitions above given. Walker v. Sherman, 20 Wendell, 636; Teaff v. Hewett, 1 Ohio State, 511; Cook v. Whi-

ting, 16 Illinois, 480. And "as to mortgages, there seems to be no good reason for saying that they can be said to pass any different right, in respect to fixtures, than a conveyance." Hitchman v. Walton, 4 M. & W., 409; Langstaff v. Meagoe, 2 B. & Adol., 167; Trapps v. Harter, 3 Tynoh., 603.

Some modification has been ruled in reference to trade and ornamental fixtures; but this modification is altogether favorable to the position taken for plaintiffs in the case at bar. Fixtures put up for purposes of trade and ornament, though actually affixed to the freehold, are now generally held not to pass to the mortgagee. Winslow v. Merchant's Ins. Co., 4 Metcalf, 306; Amos & Ferard on Fixtures, sec. 4, commencing on 71.

But the definition of appurtenances, by the court below, is more glaringly erroneous. It is, in effect, that a thing corporeal can be appurtenant to a thing corporeal. This, we apprehend, upsets the whole doctrine of appurtenances, from the days of Lord Coke to the present. "A thing corporeal cannot be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Coke Lit., 12 1b.; Harris et al. v. Elliott, 10 Pet., 53; Leonard v. White, 7 Mass., 6, 7, & 8; Juckson v. Hathaway, 15 Johns., 454.

The district court held an appurtenance to be something of less dignity and importance than a fixture, and even went so far as to point out the particular articles, that under this designation, would pass to the mortgagee. Not only was the definition given by the court, completely at fault, but it was error to take from the jury, the application of this definition to the facts in the case, and state the precise articles that would come within it.

STOCKTON, J.—As to the first instruction asked by plaintiffs, and refused to be given by the court, we think it involved the whole question in dispute between the parties. The controversy between them was, whether the word "appurtenances" embraced the loose, moveable articles of per-

sonal property in the daguerrean rooms of the plaintiffs. So far as such articles of personal property were to be considered as appurtenances to the daguerrean rooms, and to the business carried on therein by the plaintiffs, we think they were to be considered as embraced by the words "appurtenances;" and the court, therefore, rightly refused to instruct the jury as asked.

The second instruction asked, had before been given by the court, in its charge to the jury, wherein they were told, that "if the property replevied was legally included in the mortgage to defendant, under the terms "fixtures and appurtenances," the action could not be maintained.

So far as there was any uncertainty as to the property conveyed, dependent upon the meaning of the words used, the proper construction of the instrument of writing was to be determined by the court.

The words, "fixtures and appurtenances," have acquired a peculiar and appropriate meaning, and were to be construed according to such meaning, having due reference to the context, and to the connection in which the words are used.

The evidence, in this instance, abundantly shows that there were "fixtures" contained in the rooms of the plain-That all the right and interest of the grantor, F. M. Pickerell, in and to the sky-light, balcony, partition, and all other property, confessedly embraced by the term 'fixtures,' passed to the defendant, there is no controversy. not, however, the subject of the present action. Under the term, "appurtenances," the defendant claims, also, the property included in the bill of sale from F. M. to O. F. Pickerell; and the court charged the jury, that they might consider the defendant as entitled to hold, under the term "appurtenances," all such property as pertained or belonged to the room, or as remained there permanently, and was used in carrying on the daguerrean business; and that they might include in the same, all maps and pictures hanging on the wall, or affixed thereto, the stove and carpet, and all

Buel v. Lake.

apparatus and furniture necessary for a daguerrean room, with the machines and stock in the room, and all things used in carrying on the business.

Fixtures are personal chattels annexed to the freehold, and which may be severed and removed by the party who has annexed them, against the will of the owner of the freehold. Loose, moveable machinery, or chattels, not attached or affixed to the freehold, and used in the prosecution of any business to which the freehold is adapted, cannot be considered as a part of the real estate, nor as appurtenant to it. 12 N. H., 205. Appurtenances signifies something belonging to another thing as principal, and which passes as incident to the principal thing. 10 Peters, 25. It seems to us, not to have been the intention of the grantor to convey to the defendant, the room itself, of which he held a lease; but only to convey the fixtures and appurtenances therein, and belonging to it, as a daguerrean room.

Judgment affirmed.

BUEL V. LAKE.

The refusal of the court to strike from an answer in chancery, the affidavit of respondent, or to strike from such an answer redundant matter, is not a subject upon which to assign error.

Appeal from the Clinton District Court.

Monday, June 13.

A BILL to enjoin proceedings in an action of right, and to quiet the title to the real estate. Decree for the complainant, and respondent appeals. The questions decided sufficiently appear in the opinion of the court.

Buel v. Lake.

James Grant, for the appellant.

WOODWARD, J.—The first two errors assigned, can be disposed of before approaching the principal question.

The first is, that the court erred in refusing to strike out the affidavit of the respondent to his answer, which was moved, for the reason that the affiant averred the truth of the whole matter according to his belief only, and not absolutely, and did not distinguish between that which he stated upon his own knowledge, and that upon information and belief, for which cause the affidavit was not sufficient, either upon the rules of equity, or under the forty-second rule of the court. The motion was also placed upon the further ground, that the petitioner had waived an answer under oath.

As desirable as it may be, to have a determination of the questions arising under those provisions of chapter 104 of the Code, which relate to calling for an oath to the pleadings, we should not be justified in extending this opinion by the consideration of that question, since it is clear that the affidavit is insufficient upon the other two grounds. Besides this, it is not a subject for the assignment of error, as the matter arises in a suit in equity, and is to be disposed of in a different manner. The effect would be substantially the same, saving that though the action of the court below should be held erroneous, it would not necessarily cause a reversal of the decree. We are constrained to regard the answer as one not verified by affidavit. The counsel concedes this view, and says it was so treated by the court below.

The second error alleged, is in the refusal to strike from the answer certain matter as redundant. This, too, is not a subject upon which to assign error. It was within the discaetion of the court, and though the decision may have been erroneous, it does not possess sufficient materiality to merit discussion.

THE STATE OF IOWA, for the use, &c., v. FREDERICKS et al.

Section 330 of the Code, does not include the bond of the school fund commissioner, required by section 1090 of the Code; and it is not necessary that the bond of that officer should be approved by the county judge.

Chapter 68 of the Code was intended to furnish all the rules upon the subject of "qualification for office" by the fund commissioner.

In an action on a school fund commissioner's bond, it is not necessary, in order to make it a valid statutory bond, to aver and prove in the first instance, that the sureties were approved by the clerk and sheriff of the county.

Where the signatures to a school fund commissioner's bond, are undenied, or if denied under oath, are proved, and it is shown to have been made and signed by the officer and his sureties, as a part of his qualification for office; that the officer took the necessary oath, had the same indorsed on the bond, and both filed in the office of the proper clerk; that thereupon he entered upon the duties of the office; and when the bond is found in the possession of the state, and put in suit by her, these things are prima facis evidence that the bond was fully executed and accepted, and until satisfactorily rebutted, entirely sufficient.

Appeal from the Tama District Court.

Monday, June 13.

THE petition in this case alleges, that on the 7th day of April, 1856, the defendant, Fredericks, was duly elected school fund commissioner, for the county of Tama, for the term of two years; and that on the 21st of said April, he, with the other defendants, his sureties, made their writing obligatory, conditioned for the faithful discharge of the duties devolving upon said Fredericks as said fund commissioner. The condition of the bond is specifically set out. It is there stated that this bond was presented to the clerk of the district court of said county to be filed, and was by him filed in his office; that thereupon, said Fredericks entered upon the discharge of the duties of said office, "and from that time acted as, and in fact was, the school fund commissioner of said Vol. VIII.—70

county;" that he was duly qualified and sworn; and that during the time he was thus acting, he had received large sums of money, by virtue of his office, which he had failed and refused to pay over, &c. A copy of said writing obligatory is attached to the petition, in the form, and containing the conditions required by law—has the oath of office of said Fredericks indorsed on the same—is marked, "filed in my office, April 21st, 1856, David Applegate, clerk D. C.," but contains no indorsement of approval.

To this petition there was a demurrer, for the reason that it does not show that the bond was ever accepted or approved by the proper authorities, as required by law. This demurrer was sustained, and the plaintiff refusing to plead over, the defendants recovered their costs. Plaintiff appeals.

I. M. Preston, for the appellant.

Smyth, Young & Smyth, for the appellees.

WRIGHT, C. J.—The official bond of the school fund commissioner, is required to be deposited with the clerk of the district court, and the sureties are to be approved by such clerk, and the sheriff of the county. Code, section 1090. Section 330 provides, that the bonds of county officers shall be approved by the county judge, which approval shall be indorsed upon the bond, and signed by the approving officer. Section 337 recites, "that no official bond shall be void, for want of compliance with the statute, but it shall be valid in law for the matter therein contained."

The rule is believed to be uniform, that the bond of a public officer, and his sureties, though not good as a statutory undertaking, may be good as a voluntary obligation, and that an action at common law may be maintained thereon. To this effect are the following, among other authorities: Goodman v. Carroll, 2 Humph., 499; Gathwright v. Callaway Co., 10 Missouri, 663; Stephens v. Crawford, 3 Kel-

ley, 499; The State v. McAlpine, 4 Iredell, 140; The State v. Perkins, 10 Iredell, 333; Moore v. The State, 9 Missouri, 334; Marshall v. The State, 8 Blackf., 162.

It is true, that in suing upon such a bond, the state or county might be confined to the remedy given at common law, and could not claim any benefit given by the statute, in case of a breach of a statutory bond; but it would nevertheless be valid as a common law deed, or undertaking. The tendency of the legislation and the decisions of the courts of the different states, is to hold the obligors upon official bonds, liable as upon statutory undertakings, and to disregard objections purely technical in their character. These bonds are given for the security of the public, against the frauds and peculations of persons in official positions—the statutes requiring them, frequently give a summary process for their enforcement, and heavy damages in the way of interest on any money improperly withheld—and only upon the most cogent and satisfactory grounds, should they be held invalid. In consonance with this thought, are the cases above cited, as well as others. Thus, in 9 B. Monr., 128, it is held, that while in declaring on an official bond, it should appear that it was taken by the proper authority, yet this will be presumed, unless the opposite be alleged by plea. And in 9 Mis., 334, that the official bond of a collector, is valid against him and his sureties, though not approved by the court, as required by law. And still again, in 10 Iredell, 333, where the chairman of the the board of common schools, was not appointed on the proper day, and the county court did not require from him an official bond, but a bond was nevertheless given, with sureties for the discharge of his duties, it was held, that he and his sureties were liable on the bond, for a breach of his official duties. The section of the Code, (337), "that no official bond shall be void, for want of compliance with the statute," also indicates quite conclusively the tendency of the legislative mind, upon this subject in in this state. And in the same direction, is section 2506,

which gives a general rule on the subject of security, where no particular mode is prescribed, and directs to whom such security shall be given, or such bonds be made, and then provides "that mere mistake in any of these respects, will not vitiate the security."

In view of these cases, and this legislation, let us look at the case before us. The petition shows that Fredericks was duly elected school fund commissioner of Tama county; that after this election, he made his official bond, signed by himself and the other defendants; that this was conditioned in all respects as required by law; that it was presented to the clerk of the district court, to be filed, and was filed by him in his office; that said Fredericks took the oath of office required by law, which was duly indorsed upon this bond; that thereupon he entered upon the discharge of the duties of said office, "and from that time acted, and in fact was, the school fund commissioner of said county;" and that he, as such, received large sums of money which he had failed and refused to pay over to his successor. It is not averred, however, that the sureties were approved by the clerk and sheriff, nor that the bond was approved by the county judge.

Now, in the first place, is it necessary that the county judge should have approved the bond. Our opinion is, that section 330, does not include the bond of the fund commissioner, required by section 1090.

First. The bonds of all county officers, except those of the clerk of the district court and the county judge, are, by the general law, to be filed and kept in the county judge's office, (section 333). By section 1090, however, the bond of this officer is to be deposited with the clerk.

In the second place, chapters 65 to 72, inclusive, of the Code, relating to the subject of education, are but a compilation of the laws upon that subject, 'passed prior to that time, and published with the Code, by virtue of a joint resolution of the general assembly, approved February 5,

1851. These chapters formed no part of the general system of laws as reported by the commissioners appointed to prepare the Code. The entire law upon the subject of education-schools, school lands, and funds-remained unchanged. And while chapter 29 particularly points out the manner of giving bonds by all other officers, both state and county-directs their respective penalties-the number of sureties necessary—and the form of the oath—the office of fund commissioner is nowhere mentioned. And so it is in chapter 24, which provides for "elections, officers and their terms." Chapter 68, (sections 1089 to 1107, inclusive), provides for the election of this officer-for his giving bondits approval—his oath of office—and his general duties. This chapter is a part of the school law, and was intended to furnish all the rules upon the subject of qualification for office by the school fund commissioner.

Finally, no necessity is perceived in requiring that the county judge should approve the bond, and that the clerk and sheriff should approve the sureties. The condition of the bond is clearly pointed out by law. The county judge, therefore, has nothing to do in fixing its terms. And the same is true as to the penalty. When the sureties are approved, what then remains to be done by the county judge? We can conceive of nothing.

The sureties, then, are to be approved by the clerk and sheriff, and this is all that is required. To make it a valid statutory bond, is it necessary to aver and prove, in the first instance, that they were thus approved. We think not. Where the signatures to the bond are undenied, or if denied under oath, are proved, and where it is shown to have been made and signed by the officer and his sureties, as a part of the "qualification for office," as it is styled in the Code—where the officer took the necessary oath, had the same indorsed on the bond, and both filed in the office of the proper clerk—where it is shown that thereupon he entered upon the duties of said office, and continued to fill the same—and when the bond is found in the possession of the state, and

put in suit by her, we think these things are, at least, prima facie evidence that it was fully executed and accepted, and until satisfactorily rebutted, entirely sufficient. If the bond never was, in fact, received or accepted, then, of course, the question would be very different. The presumption is, however, where it is produced from the proper depository, that it was properly approved and accepted. We are, at least, not inclined, except in a case clearly requiring it, to hold that such an objection can be made by the obligors on the Relying upon the sufficiency and validity of the bond, the officer has been permitted to take upon himself the duties of the office, and enjoy its emoluments. Prima facie, at least, this undertaking was delivered by all the obligors, and received by the officers acting for the state and the school fund, as the proper official bond of the commissioner; and it does not lie in the mouth of those executing it. to say, that unless it was formally accepted and approved, it is invalid. If the officer has, as charged, received a portion of the school money, which he refuses and neglects, contrary to his undertaking and solemn oath, to pay over, the spirit, as well as the letter and policy of the law, dictates that he and his sureties shall be liable for it, upon a bond given even under the circumstances here disclosed, rather than that he and they shall avoid liability, by interposing a defence that has neither good law or morality to sustain it.

We are referred by counsel for appellees, to the case of *The U.S. Bank* v. *Dardridge* 6 Pet., 440. An examination of the case, satisfies us that it sustains the positions taken above. The case of *Carr* v. *State*, 4 Iowa, 289, is so entirely unlike this, in all its material facts, that we need not comment upon it.

Judgment reversed.

INDEX.

ACCOUNT.

- 1. A party is not called upon to dispute an account, on every occasion on which it may be presented; and when evidence of any act or declaration of a party is given, as tending to prove the account, care should be exercised in determining whether the circumstances required the defendant to dispute the account, so as to cause his omission to do so to have weight against him. Churchill et al. v. Fulliam, 45.
- 2. Where in an action on an account the court instructed the jury as follows: "That any act or declaration of the defendant, as a payment made, or claimed to have been made, without disputing, at the time, the correctness of the account, is a circumstance which may be considered by the jury, as proof of, or tending to prove, the correctness of the account;" Held, That the instruction was too broad and unqualified. Ib.
- 8. Where the lease of a building provided, that if the lessee would put up a summer kitchen, adjoining the rooms leased, on the south, the lessor would pay him the cost of it, at cash rates, at the expiration of the lease; and where the lessee built the kitchen, and on the day it was completed, assigned the demand for the payment of it on the lease, as follows: "For value received, I hereby assign to F. Z., all my rights and benefits of the last clause of the within lease, and empower him to collect the cost of the said kitchen, and apply the same for his own benefit;" Held, 1. That the fact that the agreement to pay for the kitchen was in writing, did not constitute it such an agreement as is intended by section 949 of the Code; 2. That the claim assigned was only an open account, coming under section 951 of the Code, which permitted the assignee to bring suit on the claim, in his own name, and gave the debtor the right to avail himself of any defense or set-off, legal or equitable, against the assignee which he had against the assignor, before the commencement of the suit. Zugg v. Turner, 223.
- In an action on an open account, in the name of an assignee, where the assignment is bona fide, and without recourse, and where no set-off or cross claim against the assignor is pleaded, the assignor is a competent witness to prove the account. Platt & Co. v. Hedge, 886.
- An assignor of an open account, in an action by the assignee, is a competent witness for the plaintiff, to prove the items of the account, where the assignment is bona fide, and the defendant denies the account, and pleads payment. Platt & Co. v. Hedge, 892.

ACTION.

The term "civil actions," in section 2098 of the Code, includes everything except those cases which come under the criminal jurisdiction of the courts. Tomlinson v. Hammond et al., 40. Vol. VIII.—71

2. Parties cannot make an agreement, before action, in relation to the assignment of a written contract, that shall have the effect of placing upon the record, a plaintiff who has no real interest in the prosecution of the action. Allen v. Newberry, 65.

ADMINISTRATOR.

- 1. A contract of an administrator relating to the estate of the decedent, such as he had authroity to make, will enure to the benefit of the heirs, after it shall be ascertained that it is not required to pay the creditors of the estate. Stewart et al. v. Chadwick et al., 463.
- 2. A contract concerning an interest in a claim, must be treated as personalty, and pertains to the administrator of the estate; and the right or interest will descend to the heirs of the decedent. Ib.
- 3. The omission of an administrator to inventory a claim, or other interest of the decedent, will not operate to forfeit the right of the heirs to any portion of the estate; nor need the heirs obtain authority from the probate court, to prosecute for the recovery of an interest in the estate, which they may regard themselves as entitled to. Ib.
- 4. The knowledge of the interests of an estate, which an administrator obtains in the discharge of his duties, is competent to establish the fact that there was such a claim, or such a demand, belonging to or set up by the estate, though it may not be sufficient to fix its original truth or validity, and is not hearsay evidence. *Ib*.

ADMISSION.

- 1. An infant is not bound by admissions made in his or her behalf, unless such admissions are for the benefit of the infant. Raleton v. Lahee, 17.
- 2. Where there is an infant defendant, and it is necessary, in order to entititle the plaintiff to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of adults, must be proved against the infant. *Ib*.
- 2. A party seeking to have the benefit of an admission or declaration of another, must take the whole admission or declaration together, and will not be allowed to select what makes in his favor, and exclude that which makes against him. Veiths v. Hagge, 163.
- 4. Where in action on a negotiable promissory note, the defendant answered, admitting the execution of the note, and the assignment thereof, "after maturity and dishonor," and pleading a set-off against the payee of the note; Held, 1. That the admission of the assignment was materially qualified; 2. That the defendant had not so admitted the plaintiff's cause of action, as to allow his claim. Goodpater v. Voris et al., 334.
- 5. In an action on an attachment bond, where the attachment was sued out under the act of January 24, 1853, on the ground that the debtor had property which he refused to give either in payment or security of the debt, the admissions of the creditor, that the debtor has offered to secure the debt, if proved, are conclusive against him, unless qualified in such a way as to destroy their force. Drummond v. Stewart, 341.
- 6. Where it is admitted by the opposite party, that the witnesses, if present, would swear to the facts stated in an affidavit for a continuance, on the ground of the absence of such witnesses, the affidavit may be read to the jury, for the purpose of proving such facts only as the absent witness would have been permitted to testify to, if present and examined on the trial; and the party applying for such continuance, by embody-

ing improper and irrelevant matter in his affidavit, cannot require his adversary, in order to avoid the continuance, to admit that the witness, if present, would swear to such improper and irrelevant matter. The State v. Sater, 420.

7. The party making the admission, in order to avoid the continuance,

7. The party making the admission, in order to avoid the continuance, will be understood as admitting that the witness, would swear to such facts only, stated in the affidavit, as are material and proper to be given in evidence. Ib.

AD QUOD DAMNUM.

- Where in a proceeding in equity, to restrain the respondents from flowing back the waters of the Nodaway river, by their mill dam, upon the land and mill site of the complainant, on the ground that certain pro-ceedings under a writ of ad quod damnum, and the license granted to the respondents to build their dam, did not preclude the right of complainant to damages resulting to her from the acts of respondents, nor her right now to claim an injunction against them, to restrain them from from flowing back the water of the river upon her mill-site, because she was no party to said proceedings, it appeared that one of the complainants, and the husband of the other, was made a party to the proceedings under the writ of ad quod damnum, and had due notice thereof; that upon the return of the inquisition, he was duly summoned to show cause why the said license should not be granted; that no objection being made, a license was granted to respondents to build their dam eight and a half feet high; that the land was in the possession of the husband at the time of the proceedingsunder the writ of ad quod damnum, claiming to hold it by right of pre-emption; that it was entered with his money and the title taken in the name of the wife, without her knowledge, during the progress of the said proceedings; and that it remained in the possession of the husband, after its purchase in the name of the wife; Held, That the complainants were bound by the proceedings under the writ of ad quod damnum, and the judgment of the district court rendered thereon, granting license to respondents to erect their mill dam. Lummery v. Braddy, 33.
- 2. Where a license is granted for the erection of a mill dam, under a writ of ad quod damnum, the proceedings amount to a condemnation of so much of the land, and of the right of the owner thereto, as may be affected by the flowing back of the water, when the dam is raised to the height prescribed. B.
- 3. A judgment for damages caused by the flowing of lands by a mill dam, which were not foreseen and estimated by the jury of inquest under a writ of ad quod damnum, afford no ground for an injunction against the owner of the mill dam, nor does it affect his rights under his license. Ib.

AFFIDAVIT.

- 1. Where in a suit commenced by attachment, the petition was addressed to the district court of the proper county, and the affidavit for the writ attached to the petition was signed by the affiant, and certified as follows: "Subscribed and sworn to before me, this 26th day of February, 1858, H. B. M, J. P.;" and where it was urged that it did not appear where the affidavit was made; Held, 1. That the presumption was, that the justice administered the oath within the proper county; 2. That the failure to set out more definitely, the county and state where the oath was administered, was an omission which could not materially prejudice the appellant. Snell v. Eckerson, 284.
- 2. The word "property," in the act entitled, "An act to amend section 1848 of the Code of lowa," approved January 24, 1858, includes all



the other kinds of property mentioned therein; and when the affiant, in an affidavit for a writ of attachment, has made oath that the debtor has property, it is not intended to compel him to specify in what the property consists. Bates v. Robinson, 318.

- 3. A party, asking an attachment, is not required to specify in his affidavit the kind of property owned by the debtor, and to stake his truth and his attachment upon his ability to prove the ownership of that particular species of property. *Ib*.
- 4. It is not essential that the affiant, in his affidavit for a writ of attachment, should sign the oath; and the affiant is as liable to the penalties of perjury if he does not sign, as if he does. Ib.
- 5. Where a petition, after stating the cause of action, alleged the facts necessary to authorize the issuance of an attachment, to which the clerk of the district court annexed his jurat, over his signature, certifying that "A.S., one of the attorneys for the plaintiff, makes oath that the matters and things stated in the above petition, are true, &c.; Held, That the petition was sufficiently subscribed and sworn to. 1b.
- 6. While it is the better practice, and desirable in all cases where the oath is made by one not a party, or one not presumed to have the information, that the affiant i an affidavit for a writ of attachment, should state his means of knowledge; yet such a statement is not essential in such an affidavit. Ib.
- 7. Under the act entitled "An act to amend section 1848 of the Code of Iowa," approved January 24, 1853, the refusal to pay, or secure, the debt by property, is the essential act; and requires no further intent, or averment of intent, in the affidavit for the writ of attachment than is implied in the fact and averment of refusal. 15.
- 8. Where it is admitted by the opposite party, that the witnesses, if present, would swear to the facts stated in an affidavit for a continuance, on the ground of the absence of such witnesses, the affidavit may be read to the jury, for the purpose of proving such facts only as the absent witnesses would have been permitted to testify to, if present and examined on the trial: and the party applying for such continuance, by embodying improper and irrelevant matter in his affidavit, cannot require his adversary, in order to avoid the continuance, to admit that the witness, if present, would swear to such improper and irrelevant matter. The State v. Sater, 420.
- 9. Where in an affidavit for a continuance, on the ground of the absence of witnesses, the affiant, after stating the facts he expected to prove by the absent witnesses, alleged that he could also prove by said witnesses, the character of the prosecuting witness, as follows: "That he is a man of notorious bad character; that he is esteemed a horse-thief; that he is totally unworthy of belief; and that he is now, or has recently been, under such charge in Davis county," and the prosecution admitted that the witnesses, if present, would swear to the facts stated in the affidavit; and where on the trial, the defendant offered to read the said affidavit to the jury, which being objected to, the court excluded so much thereof as attacked the character of the prosecuting witness; Held, That the court ruled correctly. Ib.
- 10. On a motion to set aside a verdict, in a criminal case, on the ground that one of the jurors had, previously to the trial, expressed an opinion as to the guilt of the defendant, the affidavit of the defendant is not sufficient to show that the juror was examined under oath, before he was sworn as a juror, to ascertain whether or not he had formed or expressed such an opinion. The State v. Shelledy, 477.



AGENT.

- 1. A person who acts as the mere agent of another in a transaction, ought not to be made a party to a suit, unless he is charged with fraud in the transaction. He has no interest in the suit, and the other parties have a right to his testimony. Lyon v. Tevis, 79.
- 2. Bill to enjoin the collection of a judgment alleged to have been paid. The attorney who obtained the judgment for the plaintiff was made a party respondent. Demurrer to the bill for that reason; *Held*, That the attorney was an improper party. *Ib*.
- 3. To bind a principal, by the representations of a third person, the agency of such third person must be shown otherwise than by proof of his declarations. *Moffitt* v. *Cressler*, 122.

AMENDMENT.

1. An action for the value of a horse, sold under an execution issued by the defendant as justice of the peace. On the trial, at the October term, 1856, the jury returned a verdict as follows: "We, the jury, find the value of the horse to be \$150 00." Judgment in favor of the plaintiff was rendered for that sum, with costs. An appeal to the supreme court was perfected in June, 1857. In September, 1857, a motion was made to amend the record of the cause, based upon an affidavit, to the effect that the jury returned the value of the horse by consent of parties; that the parties had agreed that the liability of the defendant to pay for the same should be left to the court, as a question of law; and that the court, after full argument, had found the defendant liable, and rendered judgment accordingly. The motion was heard, but whether the defendant was present, does not appear, and amendment ordered as asked in the motion; Held, That the amendment made, was not "the correction of an evident mistake," within the meaning of section 1580 of the Code. Eno v. Hunt, 436.

APPEAL.

- 1. Where a party appeals to the district court from the assessment of damages of a jury appointed by the sheriff, under the act entitled an act granting to railroad companies the right of way, approved January 18, 1858, he is in court for all substantial purposes; and if he does not appear and urge his right to a new assessment, and the verdict of the jury is affirmed, he cannot object to the proceedings in the appellate court on the ground of a want of notice. Borland v. The M. & M. R. Co., 148.
- 2. In such cases, the appeal brings the cause to the district court upon its merits, and it becomes immaterial whether the appellant had notice. Ib.
- 3. Where in a suit commenced before a justice of the peace, a judgment is rendered against the defendant in default of appearance, and he appeals to the district court, it is not irregular for he district court to affirm the judgment of the justice, on the notion of the plaintiff, where the appellant does not appear. Atkins v. McCready et al. 214.
- 4. Where an appellant from the judgment of a justice of the peace, appears in the district court, he must demand a trial upon the merits, before he can object in the appellate court, that the motion of the plaintiff to affirm the judgment of the justice was improperly sustained. 16.
- Upon an appeal from an assessment of damages by a sheriff's jury, under the act entitled "An act granting to railroad companies the right

- of way," approved January 18, 1853, the cause is to be heard upon its merits, and not upon exceptions taken to the action of the sheriff or jury, or to the competency of either of them to act in the premises. The M. & M. R. R. Co. v. Rosseau, 378.
- 6. In such cases, the appeal is from the assessment of the jury, and in the district court, the inquiry is, whether the owner shall be adjudged, or is entitled to, a greater amount of damages than was awarded him by the sheriff's jury. Ib.
- 7. When the case gets properly into the district court, upon appeal, it is there for trial upon its merits, and for no other purpose: and it is immaterial whether the sheriff selecting the jury, was or was not, the agent of the railroad company; or whether the jury had, or had not expressed opinions adverse to the rights of the owners of the land; nor can the appellant, upon appeal, review the alleged illegal acts of the officers, and have them corrected. Ib.
- 8. Where a defendant in a criminal case before a justice of the peace, appeals from the judgment of the justice to the district court; and he should give the district attorney notice of the appeal, ten days before the next term of the district court; upon his failure to do so, the appeal may properly be dismissed. The State v. Moran, 399.
- 9. Section 1811 of the Code, does not apply to cases appealed from justices of the peace, by the party against whom judgment is rendered, and where upon trial in the district court, the judgment rendered against the appellant, is less than that rendered by the justice. Best v. Dean, 519.
- 10. Where a defendant appeals from a judgment rendered by a justice of the peace, and the plaintiff in the district court, recovers a less judgment than was rendered by the justice, he is entitled to recover the costs made subsequent to the appeal. *Ib*.

APPURTENANCES.

- 1. The word "fixtures" and "appurtenances" have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context, and to the connection in which the words are used. Pickerell v. Carson, 544.
- 2. Replevin. On the 30th of October, 1856, F. M. P., one of the plaintiffs, being indebted to the defendant, in the sum of \$2,500, by an instrument of writing of that date, and to secure the payment of said sum, did "sell and convey unto the said defendant, the following described premises, to-wit: all the fixtures and appurtenances contained in the daguerrean rooms on Main street, Dubuque, belonging to the said F. M. P. No schedule of the property was attached to the conveyance. On the 12th of January, 1857, F. M. P. sold and conveyed by bill of sale, to O. F. P., the other plaintiff, for the alleged consideration of \$2,000, all the daguerreotype material, stock, cameras, picture frames, paintings, furniture, one piano forte, carpet on floor, improvements and looking glass, together with the lease on the gallery, and all and singular every article in any wise appertaining to the business contained in the National Daguerreotype Gallery in Dubuque, Iowa; *Held*, 1. That the word appurtenances in the bill of sale to defendant, embraced the loose moveable articles of personal property, in the daguerrean rooms, so far as they were necessary to the business carried on therein; 2. That under the term "fixtures," all the right and interest of F. M. P. in and to the sky-light, balcony, partition, and all other property annexed to the premises, rassed to the defendant under the said bill of sale. 16.

8. Appurtenances signify something belonging to another thing as principal, and which passes as incident to the principal thing. Ib.

ARBITRATOR.

- 1. Under section 2098 of the Code, matters cognizable alone in a court of equity may be submitted to arbitrators. Tomlinson v. Hammond et al.,
- 2. A party cannot complain of an award of arbitrators, which, though it may be wanting in certainty or definiteness, was designed, and was, in fact, for his benefit and protection. Ib.
- 3. Where it is sought to set aside an award of arbitrators, on the ground of their misconduct, the fact of such improper conduct must be made fully apparent to the court. Ib.
- 4. An award need not show, affirmatively, that the witnesses before the arbitrators were sworn. It will be presumed that the arbitrators discharged their duty in respect to swearing the witnesses. *Ib*.
- 5. Where an award is recommitted to the arbitrators for reconsideration, it is not necessary that the arbitrators should be re-sworn; nor need the award, after such reconsideration, show upon its face that the arbitrators were sworn in the first instance. Ib.
- 6. Where one of two partners sold out to the other—the purchaser taking all the assets of the firm, and assuming the payment of all the lial ilities; and where in proceedings between the two partners, under a submission to arbitrators, the arbitrators found that in the keeping of the books of the firm, there had been mistakes, and that the vendor had received oredits and cash with which he was not charged, amounting to the sum of \$1,900—among which was the following item: "For credits entered, which he is not entitled to, \$1,431 84"—which sum was awarded to the vendee of the partnership interest; and where it was claimed that the vendee was entitled to recover for only one half of the said sum of \$1,431 84; Held, That the vendee having purchased the interest of his partner, he was substituted to all the rights of the partnership, and whatever either was owing to the firm belonged to him. Ib.
- 7. Every presumption is in favor of the correctness of an award of arbitrators. Ib.
- 8. Where parties to a suit then pending in court, submit the matters involved therein to arbitrators, by agreement, and without any order of court, the agreement of submission must be acknowledged, as required by section 2100 of the Code. Fink v. Fink, 318.
- 9. Where a submission to arbitrators is not acknowledged, when required, the award cannot be received and adopted as one made under a statutory submission; but it may still be good, as at common law, and an action maintained thereon, as upon any other agreement. Ib.
- 10. Where a cause was pending in the district court, involving the examination of long accounts, and the parties filed in said court a written agreement to submit the cause to arbitration, under which the arbitrators were "to meet and determine said matters on the 17th day of August, 1858, and to adjourn from day to day until concluded, and within five days thereafter, file the same in the district court of Polk county, or the clerk's office thereof;" but no order of court was made directing the submission, nor did the parties appear before a justice of the peace, or other officer, and acknowledge the submission; and where the arbitrators met on the day named, heard a portion of the testimony, and adjourned to the next day, on which (the 18th of August), they agreed upon their award in favor

of the plaintiff, and it was filed with the clerk of the court, on the 23d of August, 1858; and where the plaintiff's motion for judgment on the award was overruled, and the court refused to enter judgment thereon: Held, 1. That the award was filed within the time required by the submission; 2. That the submission should have been acknowledged, to authorize the court to adopt and render judgment upon the award; 3. That there was no error in the action of the court in refusing to render judgment on the award. Ib.

ASSAULT AND BATTERY.

- 1. An indictment which distinctly charges an assault and battery only, is good, although it charges the act as being done riotously, and in a violent and tumultuous manner, and such an indictment does not charge an unlawful assembly and riot; nor does it unite two distinct offenses. The State v. McClistock, 203.
- 2. Where several persons are jointly indicted for a joint trespass on two other persons, it is error to instruct the jury, that if the defendants struck one of the persons charged to have been assaulted, they are guilty of assault and battery, unless they struck in self defense. *Ib*.
- 3. All who instigate and promote the commission of an unlawful act, are equally guilty with those who commit the act itself; and a person aiding and abetting the commission of an assault and battery, is as guilty as the others, although he did not strike himself. Ib.
- 4. Where two or more persons are indicted for an assault on two persons, they cannot be convicted of the joint offense, unless the jury find that the assault and battery was committed upon both of the persons named in the indictment. Ib.
- 5. The charge of an assault upon two persons is, in legal contemplation, so far different from a charge of assault upon one of them, that proof of the commission of the act in regard to one, does not sustain the indictment. 1b.
- 6. Where several persons are charged with a joint assault and battery on two persons, either of the defendants may be convicted for his own separate assault on the persons named in the indictment. *Ib*.
- 7. Under an indictment charging several defendants with a joint assault and battery on two different persons, neither of the defendants can be convicted for an individual and separate assault and battery on one of the persons charged in the indictment to have been assaulted. Ib.

ASSAULT WITH INTENT TO COMMIT A GREAT BODILY INJURY-

- It is the intent with which the injury is inflicted, or attempted, that
 constitutes the offense of an assault with intent to commit a great bodily
 injury; and when the intent is shown, that which would be an assault unaccompanied with the felonious intent, will be such when thus accompanied. The State v. Malcolm, 413.
- 2. Where under an indictment for an assault with intent to commit a great bodily injury, it appeared that the defendant was in a store-room, and while there some words passed between him and one O.—the person assaulted—that defendant slid off the counter with a bowie knife in his right hand, and threatened O. with violence, when he was caught and held for some time; that O. run, and was soon followed by the prisoner, with the knife in his hand; that he was caught while in pursuit; that



while in the house, he was not within ten feet, and when out of the house, not within fifty feet of said O.; that he did not attempt to throw the knife, but had to be held, in order to prevent his following up more closely said O.; and that he was very angry; and where the court in tructed the jury as follows: 1. That if the defendant had a bowie-knife in his hand of sufficient capacity to inflict a great bodily injury upon O., and was only prevented from inflicting a great bodily injury upon him, by others, then he is guilty; 2. That if he had the intent, and means to inflict the offense charged, and was only prevented from inflicting the same, by others, the distance of defendant from O., is not material; 3. That if the jury should be of opinion, from the evidence, that the defendant had the means and ability to inflict a great bodily injury upon O., and find the defendant intended, and endeavored to inflict such injury, and would have done so, had he not been arrested and prevented by the interference of others, it will be their duty to find against the defendant; Held, That the instructions were correct. Ib.

ASSIGNMENT.

- 1. After an action has been commenced, the plaintiff may sell and dispose of the judgment he may recover, without investing the person purchasing it, with the legal interest to the chose in action; and under such an assignment, it would be improper for the court to substitute the holder of it as plaintiff in the action, without the power to prosecute in his own name. Allen v. Newberry, 65.
- Where in an action on four promissory notes, commenced in the name of the payee, before the defendant answered, there was filed with the papers in the cause, an instrument in writing, as follows: "Whereas, I, T. F. A., have commenced a suit in the district court of D. county, to the November Term, 1857, vs. S. N., claiming \$5,000 as money due me on four promissory notes, on which an attachment has been issued: Now, therefore, in consideration of the sum of \$1,500, to me in hand paid by L. N., of the same place, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and set over to the said L. N., for said consideration, said suit, and the claim, &c., and all the interest which I have in and to the same, and any judgment I may recover in said district court, in said cause; and authorize the said L. N., in my name and stead, to prosecute said suit in my name and stead to final judgment, and receipt for the same to the said S. N.; and generally to do and perform all acts and things in my name, that may be necessary for him to do, to perfect his judgment lien, and to collect the same, against the said S. N., as fully as I myself could do-he at all times acting only for his benefit, and in his behalf; and I hereby, for the consideration aforesaid, authorize the said L. N. to prosecute the said claim, so in my name as aforesaid, but at his costs-hereby covenanting that I will in no event claim anything that may be recovered in said suit, or that may be obtained in said cause against the said S. N. Witness my hand this 12th of October, 1857," and which was signed by the plaintiff; and where the defendant answered, admitting the execution of the notes, and denying "that plaintiff holds against him any such notes as are described in his petition;" and where on the trial of the cause, the plaintiff offered the notes in evidence, on which notes there were no endorsements, and thereupon the defendant called the attention of the court to the said assignment on file, and asked that the jury be instructed to find for said defendant, on the ground that the said assignment showed that the suit was not prosecuted in the name of the real party in interest; and where the court ruled that judgment could not be rendered in the name of the plaintiff, but that he might amend, by substituting the assignee in his place, and take a continuance of the cause, which the plaintiff de-

Vol. VIII.—72

clined to do, and the court then instructed the jury to find for the defendant; Held, 1. That it was error to instruct the jury to find for the defendant; 2. That the assignment did not invest the assignee with the legal interest in the notes, and was only a transfer of the judgment the assignor expected to recover. Ib.

3. Where a party in a state of insolvency, or in contemplation of insolvency, on his own motion, executes to certain creditors, at the same time, without consultation with them, several mortgages and deeds of trust, of all his property not exempt from execution—each instrument covering the same property, and reciting that it is subject to the prior conveyance—and causes the same to be filed for record on the same day, five minutes time intervening between the filing of each, the transaction constitutes, in legal effect, a general assignment, and not being made for the benefit of all the creditors alike, without any preference of one over another, is void. Burrows et al. v. Lehndorff, 96.

4. Where a debtor undertakes to dispose of all his property for the benefit of his creditors, giving a preference, he being insolvent, or in contemplation of insolvency, the fact that he has failed to appoint a trustee, as contemplated by law, will not render the assignment valid, as against

creditors objecting to it. Ib.

5. In an action of trespass, where the material question is, whether an assignment was made with intent to hinder and delay creditors of the assignor, and is, therefore, void, a question to a witness, whether a cellar was a proper place to store goods, is immaterial and irrelevant. Savery v. Spaulding, 239.

- 6. The declarations of an assignor for the benefit of creditors, as to the amount of goods on hands, made after the execution of the assignment, are not admissible in evidence against the assignee. *Ib*.
- 7. A breach of trust, or violation of duty, by an assignee, does not affect the question of the validity of an assignment, for the benefit of creditors; and evidence of such breach of trust, or violation of duty, is not admissible to show that the assignment is fraudulent and void. *Ib*.
- 8. Where in an action of trespass, in which the plaintiff claimed the property under an assignment for the benefit of creditors, and the question was, whether the assignment was fraudulent and void, the defendant called the clerk of the court, and asked him a question as follows: "State whether the plaintiff, as assignee of C. & B., has reported to the district court of P. county, the situation and amount of the estate of said C. & B., either in writing or otherwise, and whether any such written statement was on file in his office." which question being objected to, was excluded by the court; Held, That the question was properly excluded. Ib.

9. Where a party under the belief that he is insolvent, though he may not be so in fact, makes an assignment, in good faith, for the benefit of all of his creditors, the assignment is not void, for the reason that he was

not insolvent. Tb.

- 10. Where a party at the time of making an assignment for the benefit of creditors, is unable to pay his debts according to the usage of trade, or unable to proceed in his business, without some general arrangement with his creditors, or some indulgence by way of the extension of the time of payment, he is insolvent in the contemplation of law, and may make a valid assignment. Ib.
- 11. The fact that some of the agents and servants of the assignee, after the assignment, sold some of the property assigned on credit, will not vitiate the assignment. *Ib*.
 - 12. The fact that the grantor, in an assignment for the benefit of cred-

itors, was engaged in the store in the capacity of clerk only, after the execution of the assignment, is not, of itself, evidence of fraud in making the assignment. *Ib*.

- 13. Where in an action of trespass, brought by an assignee under an assignment for the benefit of creditors, in which the question was, whether the assignment was fraudulent and void, a witness for the defense answered, that he thought he could "guess very nearly the amount of goods the assignors had in their store, at the time of the assignment," and the court decided, that if the witness knew the amount, he might state it, but that he could not give an opinion on the subject; Held, That even if the ruling of the court was erroneous, the testimony was in no sense so important or material, that its rejection could have prejudiced the rights of the defendant, or should call for a reversal of the judgment. Ib.
- 14. Where in action on a negotiable promissory note, the defendant answered, admitting the execution of the note, and the assignment thereof, "after maturity and dishonor," and pleading a set-off against the payee of the note; Held, 1. That the admission of the assignment was materially qualified; 2. That the defendant had not so admitted the plaintiff's cause of action, as to allow his claim. Goodpaster v. Voris et al., 334.
- 15. Instruments of writing, conveying property to creditors, to secure the payment of money advanced, are but assignments to creditors; and where they do not definitely specify the sum due, parol evidence is admissible to show the true amount of the debts. Platt v. Hedge & Co. 386.
- 16. Where an assignee, under an assignment for the benefit of creditors, files a bond as required by law, and also an inventory and appraisement of the assigned property, sworn to by two disinterested persons, the county judge possessed no power or authority, under the act entitled "an act to amend chapter 62, title 13 of the Code of Iowa, and to close up assignments for the benefit of creditors," approved January 29, 1857, to remove the assignee, and appoint a new one. Drain et al. v. Mickel, 438.
- 17. The power conferred upon the county judge, by section twelve of the act in relation to assignments for the benefit of creditors, approved January 29, 1857, is to be exercised when there is likely to occur a failure of the trust, and not merely where there is an imperfect performance of the duty prescribed. *Ib*.
- 18. An imperfect or defective inventory of property, conveyed under an assignment for the benefit of creditors, cannot be treated as an absolute nullity. *Ib*.

ATTACHMENT.

- 1. Where a bond for an attachment, is signed by the principal and sureties, in their partnership name, it is sufficient. Churchill et al. v. Fulliam, 45.
- 2. In attachment, the penalty of the bond should be double the amount of the value of the property which the sheriff may attach, and not double the amount of the claim sworn to be due. *Ib*.
- 3. Where in a suit commenced by attachment, the amount of the claim sworn to, was \$1,012 69, and the bond was in the penal sum of \$2,025 38; Held, That the bond was insufficient. Ib.
- 4. In attachment, the defendant cannot, in the principal action, take issue upon the facts alleged as the basis for the attachment. Ib.
- 5. Where a plaintiff, in commencing his action, brings himself within the provisions of section 1852, which provides for commencing suit by at-

tachment previous to the debt becoming due, in certain cases, the defendant cannot set up the defense that the debt was not due at the commencement of the action. Ib.

- 6. In an action commenced by attachment, it is not error to strike from the files so much of the answer as takes issue upon the causes alleged in the petition for the writ of attachment. Burrows et al. v. Lehndorff, 96.
- 7. Where the plaintiff, in a suit commenced by attachment, in all respects complies with the law, the presumption is that the attachment was rightfully sued out; and in an action on the attachment bond, if the party against whom the writ issued, claims that it was wrongfully issued, the burden of proof is upon him to establish that fact, by the proof of such facts and circumstances as tend to establish the truth of what he asserts. Ib.
- 8. The execution of a chattel mortgage by a debtor to a creditor, upon property which is subject to prior liens of the same kind, if done by the debtor, without the knowledge or request of the creditor, and if not accepted by him, is not such a giving of property in payment or security of the debt, as the law requires, in order to preclude an attachment. Ib.
- 9. Where a suit is commenced by attachment, and property levied upon, other creditors cannot, on their own motion, be made parties defendant, on the ground of collusion between the plaintiff and defendant, and permitted to show that the defendant is not indebted to the plaintiff; nor can they be allowed to show that the attachment was wrongfully sued out. Whipple v. Cass, 136.
- 10. Where in an action commenced by attachment, on the ground that the defendant had property, &c., not exempt from execution, which he refused to give, either in payment or security of the debt, the defendant claimed damages of the plaintiff, by way of set-off, for the wrongful suing out of the attachment, denying the causes alleged in the affidavit for the writ, and averring that the attachment was wrongfully sued out; and where on the trial, the plaintiff offered no evidence to prove that the defendant had property, &c., or that payment or security had ever been demanded, and refused by the defendant, and thereupon the defendant asked the court to instruct the jury, "that the burden of proof was on the plaintiff, under the issue joined, to show such demand and refusal," which instruction the court refused to give; Held, That the instruction was properly refused. Veiths v. Hagge, 168.
- 11. In an action on an attachment bond, for wrongfully suing out an attachment, the burden of proof is upon the plaintiff, to show that the writ was wrongfully sued out; and where the attachment was issued on the ground that the defendant in the writ had property, &c., which he refused to give either in payment or security of the debt, and he relies upon the fact that no demand was ever made upon him for such payment or security, and that there was, consequently, no refusal, he must prove it. Ib.
- 12. A party injured by the wrongful suing out of a writ of attachment, has no other remedy for his injury, than an action on the attachment bond, unless the case is such that an action of trespass would lie. *Ib*.
- 18. The law has made no provision for any issue or proceeding to try the truth of the facts averred in a petition or affidavit for a writ of attachment, nor for the dissolution of the writ, upon its being ascertained that the said averments are not true, and that the writ was wrongfully issued, even though the same should be made to appear from the verdict of a jury. *Ib*.
- 14. Where in an action commenced by attachment, in which the defendant claimed damages of the plaintiff, by way of cross-action, for the

wrongful suing out of the attachment, the jury found for the plaintiff on his cause of action, and rendered a special verdict, that the attachment was wrongfully sued out, assessing the damages of the defendant therefor at ten dollars; and where the defendant then moved the court for a judgment on said special verdict, quashing the writ of attachment which motion was refused, and judgment rendered for the plaintiff; *Held*, That the motion to quash the attachment was properly overruled. *Ib*.

- 15. ATTACHMENT. The petition, affidavit for the writ, and attachment bond, were filed on the 29th day of November, 1857, and the writ issued on the same day. The original notice was dated the 30th of November, and received by the sheriff on the same day. The defendant moved to quash the writ of attachment, because it was issued before the commencement of the action, which motion was overuled; *Held*, That the motion was properly overruled. *Hogan* v. *Burch*, 309.
- 16. When a petition is filed, an action is so far commenced, that a writ of attachment may issue, before the original notice is placed in the hands of the sheriff for service. Ib.
- 17. The word "property," in the act entitled, "An act to amend section 1848 of the Code of lowa," approved January 24, 1858, includes all the other kinds of property mentioned therein; and when the affiant, in an affidavit for a writ of attachment, has made oath that the debtor has property, it is not intended to compel him to specify in what the property consists. Bates v. Robinson, 318.
- 18. A party, asking an attachment, is not required to specify in his affidavit the kind of property owned by the debtor, and to stake his truth and his attachment upon his ability to prove the ownership of that particular species of property. Ib.
- 19. It is not essential that the affiant, in his affidavit for a writ of attachment, should sign the oath; and the affiant is as liable to the penalties of perjury if he does not sign, as if he does. Ib.
- 20. Where a petition, after stating the cause of action, alleged the facts necessary to authorize the issuance of an attachment, to which the clerk of the district court annexed his jurat, over his signature, certifying that "A. S., one of the attorneys for the plaintiff, makes oath that the matters and things stated in the above petition, are true, &c.; Held, That the petition was sufficiently subscribed and sworn to. 1b.
- 21. While it is the better practice, and desirable in all cases where the oath is made by one not a party, or one not presumed to have the information, that the affiant in an affidavit for a writ of attachment, should state his means of knowledge; yet such a statement is not essential in such an affidavit. 16.
- 22. Under the act entitled "An act to amend section 1848 of the Code of lows," approved January 24, 1858, the refusal to pay, or secure, the debt by property, is the essential act; and requires no further intent, or averment of intent, in the affidavit for the writ of attachment than is implied in the fact and averment of refusal. Ib.
- 23. Under the act entitled "an act to amend section 1848 of the Code," approved January 24, 1853, which prescribes additional causes for which attachments may assue, the attachment is allowed when the debtor will neither secure nor pay the debt with his property. The law gives to the debtor the right to elect, and if he is willing to do either, there is no such wrong intent or purpose, as will warrant an attachment. Drummond v. Stewart, 341.
 - 24. Where a debtor offers to transfer sufficient property to reasonably

secure or pay the debt, the fact that the creditor thought that he could not make his money out of the security as soon as he wanted it, affords no ground for an attachment, under the law of January 24, 1853. *Ib.*

- 25. Where in an action on an attachment bond, the court instructed the jury as follows: "That it is no justification or mitigation of damages, that the original indebtedness or note, was a just claim, and that the creditor recovered judgment upon the same. It does not entitle a party to an attachment, simply because his claim is just. Some one of the causes laid down in the statute, must exist, or the suing out of the attachment is wrongful;" Held, That the instruction was correct. Ib.
- 26. Where an attachment is sued out under section 1848 of the Code, on the ground that the defendant is, in some manner, about to dispose of, or remove his property out of the state, without leaving sufficient remaining for the payment of his debts, the affidavit should also allege that such disposition or removal of the property, was with the intent to defraud creditors. Pittman & Bro. v. Searcey, 352.
- 27. Where it is assigned as error, that the court would not permit a party to amend his affidavit for a writ of attachment, or that the order quashing the writ was made unconditionally, the record should show that the party asked leave to amend, and that such leave was refused by the court; and unless these facts appear from the record, it is not shown affirmatively that there was error. Ib.
- 28. Whether a motion to quash a writ of attachment, constitutes a special or general appearance, the defendant has a right to appear and object to the writ; and his subsequently making default is no ground of complaint to the plaintiff. 1b.

ATTACHMENT BOND.

- 1. Where in an action on an attachment bond, the plaintiff alleged that he offered to give the defendant, as attaching creditor, security from his property, and among other things, offered to assign to him his books of account; and where on the trial, in order to show what amount was due on his books, and that the persons against whom the accounts stood were responsible, he called a witness, who testified that the demands on the books amounted to about \$700 00, and that the debtors therein were responsible men, but that he could not then recollect their names, nor the amounts due from them respectively, and could give the names of but three persons—to which evidence the defendant objected, for the reason that the books should be produced; *Held*, That the evidence was competent, with, or without, the books. *Drummond* v. Stewart, 341.
- 2. In an action on an attachment bond, the writ of attachment, and the officer's return thereon, is admissible in evidence. Ib.
- 3. Where an attachment de facto has been made, the defendant in an action on the attachment bond, cannot set up as a defense, that the process which he had sued out, and set agoing, was not executed in accordance with law; nor will the defective service of the writ of attachment, render the writ void. Ib.
- 4. In an action on an attachment bond, where the attachment was sued out under the act of January 24, 1853, on the ground that the debtor had property which he refused to give either in payment or security of the debt, the admissions of the creditor, that the debtor had affered to secure the debt, if proved, are conclusive against him, unless qualified in such a way as to destroy their force. Ib.



5. Where in an action on an attachment bond, the court instructed the jury as follows: "That it is no justification or mitigation of damages, that the original indebtedness or note, was a just claim, and that the creditor recovered judgment upon the same. It does not entitle a party to an attachment, simply because his claim is just. Some one of the causes laid down in the statute, must exist, or the suing out of the attachment is wrongful:" Held, That the instruction was correct. Ib.

ATTORNEY.

1. Where in an action on a promissory note, the defendant obtained a rule on the attorney of the plaintiff, to show the authority under which he appeared to prosecute the action, which rule was based upon an affidavit, alleging that the plaintiff, (the indorsee) and the payee of the note, resided at Rome, in the state of New York; that the plaintiff, some time in the year 1855, told the affiant that the payee of the note had simply transferred to him the note sued on, as collateral security for the payment of a claim held by him against the said payee; that he had received the same upon the express understanding and condition between them, that he should not bring suit on the same against the defeudant; and that he should not bring any action against him; and where the attorney answered the rule under oath, stating that in July, 1855, he received a letter from D. & L., of Rome, N. Y., whom he believed to be attorneys at law, of that place, enclosing the note sued on, stating that the note was the property of the plaintiff, and instructing him to secure it, or put it at once in process of collection, which showing, the court held sufficient; Held, 1. That the affidavit filed on the part of defendant did not make out a prima facie case, and the court might well have refused the rule in the first instance: 2. That the showing made by the attorney was sufficient. Savery v. Savery, 217.

AWARD.

- 1. A party cannot complain of an award of arbitrators, which, though it may be wanting in certainty or definiteness, was designed, and was, in fact, for his benefit and protection. Tomlinson v. Hammond et al., 40.
- 2. Where it is sought to set aside an award of arbitrators, on the ground of their misconduct, the fact of such improper conduct must be made fully apparent to the court. Ib.
- 3. An award need not show, affirmatively, that the witnesses before the arbitrators were sworn. It will be presumed that the arbitrators discharged their duty in respect to swearing the witnesses. *Ib*.
- 4. Where an award is recommitted to the arbitrators for reconsideration, it is not necessary that the arbitrators should be re-sworn; nor need the award, after such reconsideration, show upon its face that the arbitrators were sworn in the first instance. *Ib*.
- 5. Every presumption is in favor of the correctness of an award of arbitrators. Ib.
- 6. Where a submission to arbitrators is not acknowledged, when required, the award cannot be received and adopted as one made under a statutory submission; but it may still be good, as at common law, and an action maintained thereon, as upon any other agreement. Fink v. Fink, 313
- 7. Where a cause was pending in the district court, involving the examination of long accounts, and the parties filed in said court a written agreement to submit the cause to arbitration, under which the arbitrators were "to meet and determine said matters on the 17th day of August,



1858, and to adjourn from day to day until concluded, and within five days thereafter, file the same in the district court of Polk county, or the clerk's office thereof;" but no order of court was made directing the submission, nor did the parties appear before a justice of the peace, or other officer, and acknowledge the submission; and where the arbitrators met on the day named, heard a portion of the testimony, and adjourned to the next day, on which (the 18th of August), they agreed upon their award in favor of the plaintiff, and it was filed with the clerk of the court, on the 23d of August, 1858; and where the plaintiff's motion for judgment on the award was overruled, and the court refused to enter judgment thereon: Held, 1. That the award was filed within the time required by the submission; 2. That the submission should have been acknowledged, to authorize the court to adopt and render judgment upon the award; 3. That there was no error in the action of the court in refusing to render judgment on the award. Ib.

BAILMENT.

- 1. Where goods are in possession of a bailee for hire, to which, by his labor or skill, he has imparted additional value, he has a lien for his charges thereon, where there is no special contract, inconsistent with such lien; but he has no right to retain them for the payment of "other debts" due him by the bailor, without a special agreement to that effect. Nevan v. Roup, 208.
- 2. It is essential to the bailee's right to a lien upon the goods, until his charges for his labor or skill are paid, that the goods should have been delivered into his possession, for the purpose of such labor and skill. Ib.
- 3. If the bailee parts with his possession, before he is paid his charges, the lien is lost, and will not be reinstated by his again coming into possession of the goods, without the consent or agreement of the bailor. Ib.

BILL OF EXCEPTION.

- 1. When the question as to the admissibility of a witness is intended to be raised for the determination of the appellate court, it should appear from the bill of exceptions, not only that the objection to the admissibility of the witness was overruled by the court, but that the witness was sworn, and gave evidence material to the issue. Willey v. Hall. 62.
- 2. Where a cause is tried by the court, without a jury, and the finding of the court is reduced to writing, and all the testimony, with the exceptions of the party complaining, is set out in the record—all of which is signed by the judge who tried the cause, the paper is to be treated as a bill of exceptions. Snell v. Kimmell, 281.

BOND.

- 1. Where a bond for an attachment is signed by the principal and sureties, in their partnership name, it is sufficient. Churchill et al. v. Fulliam, 45.
- 2. In attachment, the penalty of the bond should be double the amount of the value of the property which the sheriff may attach, and not double the amount of the claim sworn to be due. Ib.
- 3. Where in a suit commenced by attachment, the amount of the claim sworn to, was \$1,912 69, and the bond was in the penal sum of \$2,025.38; Held, That the bond was insufficient. Ib.
 - 4. The words, "in these respects," in section 2506 of the Code, refer

to the person or body to whom the bond is made payable; and, under the same section, a bond running to the county judge is the same as if made to the county, and can be sued upon by it. Collins v. Ripley, County Judge, 129.

- The plaintiff loaned to the defendant, \$20,000, for which it gave its obligations, in the shape of acceptances, payable at its office in the city of New York, in ninety and one hundred and twenty days, and to secure the payment of the same at maturity, according to agreement, forwarded to the plaintiff thirty-four "Land Grant Construction Bonds," of said defendant, of one thousand dollars each, to be held by the plaintiff as collateral security for the payment of the money loaned. The acceptances were not paid at maturity, but were protested for non-payment, and remain wholly unpaid. The plaintiff sent the bonds of the defendant to the city of New York, with directions to have them sold at the stock exchange in said city, at public outcry, to the highest bidder, and directed a friend to see that the interests of the plaintiff were protected in the sale. Upon due notice to the defendant, the bonds were sold as directed, and the whole of them bid in for the plaintiff at the sum of \$5,477 86. In an action on the acceptances, to recover the balance due, after deducting the amount realized by the sale of the bonds; Held, 1. That the plaintiff had power to sell the bonds for the payment of the debt, and that a sale to a third person would have passed the property; 2. That the plaintiff itself could not become the purchaser, and nothing passed by the form of a sale at auction in which the bonds were bid in by the plaintiff; 3. That the bonds must be considered as still held by the plaintiff, under its original title, as collateral security for the payment of the money borrowed by the defendant. The Bank of the Old Dominion v. The Dubuque & Pacific R. R. Co., 277.
- 6. Section 330 of the Code, does not include the bond of the school fund commissioner, required by section 1090 of the Code; and it is not necessary that the bond of that officer should be approved by the county judge. The State, for the use of, &c., v. Fredericks et al., 553.
- 7. In an action on a school fund commissioner's bond, it is not necessary, in order to make it a valid statutory bond, to aver and prove in the first instance, that the sureties were approved by the clerk and sheriff of the county. *Ib*.
- 8. Where the signatures to a school fund commissioner's bond, are undenied, or if denied under oath, are proved, and it is shown to have been made and signed by the officer and his sureties, as a part of his qualification for office; that the officer took the necessary oath, had the same indorsed on the bond, and both filed in the office of the proper clerk; that thereupon he entered upon the duties of the office; and when the bond is found in the possession of the state, and put in suit by her, these things are prima facie evidence that the bond was fully executed and accepted, and until satisfactorily rebutted, entirely sufficient. 1b.

BOOKS OF ACCOUNT.

- 1. Whenever the law provides for the admission of books of account in evidence, it is based upon the idea of the presence of the books themselves upon the trial; and in their absence, evidence of their contents cannot be substituted. Churchill et al. v. Fulliam, 45.
- 2. The book itself, when admited, becomes the witness, and is still subject to any objections which may be made by the opposite party, respecting its credibility, arising from the manner in which it is kept—its appearance, alterations, erasures, confusion and irregularity—and whatever may tend to diminish its credibility in the eyes of a jury. Ib.

Vol. VIII.-73

- 3. Where in an action on an account, the plaintiffs proved the accounts by proving the character and contents of their books of accounts, by the depositions of witnesses, who were their clerks, and without producing incourt the books themselves; and where the court afterwards charged the jury as follows: "Books of account are competent evidence of dealings between the parties, if it is shown that such books have all the marks of fairness and correctness required by law; and if the party seeking to use such evidence is doing business, or residing cut of the state, or in a foreign country, it is competent for such party to take the depositions of competent witnesses, as to the contents of such books, after having laid the foundation as prescribed in section 2406 of the Code, and such testimony is original, and not secondary;" Held, That the whole proceeding was erroneous, and not within the meaning and intent of the law relating to the admission of books of entry in evidence. 1b.
- 4. A charge for "money paid" or "money lent" in an account, cannot be proved by the books of accounts of the party making the charge. Veiths v. Hagge, 163.
- 5. The paying out, or losning of money, is not usually the subject of a charge in an account; and charges of that nature are not such as are made in the ordinary course of business by one party against another. Ib.
- . 6. Where in an action on an account for goods sold and delivered, which contained charges of money lent, the party proved by a witness, that the defendant was a customer at the store of the plaintiff, and was in the habit of borrowing, from time to time, sums of money from the plaintiff, which were charged to the defendant in his account; Held, That while the evidence might show a course of business between the parties, it was not sufficient to constitute the plaintiff's books of account legitimate evidence of money paid or lent to the defendant. 1b.
- 7. Section 2406 of the Code has not made any such distinction, as that small sums of money may be proved by a party's books of account, but that large sums shall not be so proved. Ib.
- 8. But the books may more readily be admitted as sufficient to prove the payment of money of a small than a large amount, and it may be more readily concluded that the loan or payment of small sums of money, by a retail trader to his customers, and charged in their accounts, was more nearly in the ordinary course of business, than the loan or payment of large sums; and if the jury should be of opinion, that small money charges were legitimately made in the ordinary course of business, they may allow the same. 16.
- 9. Where a party against whom entries are made in books of account, or against whom an account is rendered, relies upon, or seeks to avail himself of, credits entered in his favor, he will not be allowed to do so, without at the same time, making the whole account evidence against himself. *Ib*.
- 10. Where in an action on an account, which contained charges for money lent, and in which certain credits were given to the defendant, the defendant offered no evidence of payment made by him, and the plaintiff asked the court to instruct the jury as follows: "That if the defendant claimed the benefit of the credits given him by the plaintiff, on his account, on the books of account of the plaintiff, he thereby made said books and accounts evidence to go to the jury, and to be considered by them, in support of all the items charged against the defendant therein, including the cash items, subject to be rebutted as to any of such items, by counter-evidence on the part of the defendant; and that the defendant could not claim the benefit of the items credited to him on said account

and at the same time exclude from the consideration of the jury any of the items charged against him, in the same account;" Held, That the court erred in refusing to give the instruction. Ib.

- 11. The loan or payment of money is not ordinarily the subject of charges in book accounts; and such a charge, not being such as is made in the ordinary course of business, cannot be proved by the account book. Young v. Jones, 219.
- 12. To render books of account competent to prove the payment of money, the party offering must show that he is engaged in a business to justify such charges, as that of the business of banking; or of receiving money on deposit, and paying it out for others. Ib.
- 13. If allowed at all, the privilege must be strictly guarded, and only allowed where the jury may be of opinion that the party is without any other proof, and that there has been such a course of continuous dealing between the parties, as that small sums passing between them in the ordinary course of business, became the legitimate subject of charge in book accounts. Ib.
- 14. The statute of Iowa, providing for the admission of books of account in evidence, has made no such distinction, as that small sums of meney, may be proved by a party's books of account, but that large sums shall not be so proved. *Ib*.
- 15. In an action to recover for goods, wares, and merchandise, sold and delivered, the plaintiff offered in evidence his books of account, which contained a charge against the defendant as follows: "To cash, as per receipt, \$50." The defendant objected to the competency of the book to prove the charge for money, which objection was sustained by the court; *Held*, 1. That the receipt was the best evidence of the payment of the money; and that until it was produced, or its absence accounted for, no lesser grade of evidence could be received; 2. That the books were not competent evidence to prove the payment of the money. *Sloan v. Ault*, 229.
- 16. A party cannot be made liable for money paid to his use, unless his request to pay the money, is proved by other evidence than that furnished by the books of the plaintiff. Snell v. Eckerson, 284.
- 17. Where in an action to recover for goods, wares and merchandise, sold to defendant, and for money paid by him to the firm of H. & Co., the plaintiff offered in evidence his book of original entries, to show the payment to H. & Co., which book contained an item as follows: "May 17, 1857. To amount paid H. & Co., \$45.85;" and then offered the books of H. & Co., without any proof of authority by defendant to plaintiff to pay the same; and where the defendant objected to the admission of the books of H. & Co., without first showing some authority to plaintiff to pay the same, or an assignment of the account, in some other manner than the charge on the plaintiff's books, which objection was overruled, and the evidence admitted; Held, That the court erred in admitting the evidence. Ib.

BREACH OF PROMISE TO MARRY.

1. To maintain an action for a breach of promise to marry, the plaintiff is required to prove the defendant's promise, but not necessarily an express promise; and such promise may be shown by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal understanding between them, their friends and relations, evinced and corroborated by their actions, that a marriage was to take place. Thurston v. Cavenor, 155.

- 2. Where the defendant's promise to marry is once shown, it may then be proved that plaintiff demeaned herself as if she concurred in, and approved of, his promise, and thus establish the promise on her part; and for this purpose her acts may be shown, whether the defendant was present or not, at the times of such conduct. Ib.
- 3. Where in an action for a breach of promise to marry, the court instructed the jury as follows: "That in determining the question whether or not there was a promise by defendant to marry plaintiff, they must not take into consideration any declaration made by, or conduct of, the plaintiff, not in the presence of the defendant, (unless they amount to admissions of an engagement between them); that the evidence of plaintiff's declarations, and her conduct, not in the presence of the defendant, were only admitted to show, in the discretion of the jury, a promise or assent, on her part, and should be considered by the jury for this purpose alone; and that they are not to be considered at all, unless they first find that there was a promise made by defendant to marry the plaintiff; Held, That the instruction tended more to the prejudice of the plaintiff than the defendant, and that he was not injured thereby. Ib.

BURDEN OF PROOF.

1. The true test to determine where is the burden of proof, is to consider which party would be entitled to the verdict, if no evidence were offered on either side; for the burden of proof lies on the party against whom, in such case, the verdict ought to be given. Veiths v. Hagge, 163.

CHALLENGE.

- 1. In the absence of any statutory rule, the order of proceedings in challenging petit jurors, may be properly left to the discretion of the judge trying the cause; and such discretion will not be interfered with, unless it is clearly made to appear that it has been abused. The State v. Pierce, 231.
- 2. Where on the trial of an indictment, the district attorney challenged a juror peremptorily, and then the defendant one; and where, the panel of jurors being filled, the defendant insisted that the state should exercise a second peremptory challenge, if any more were to be made, which the court refused, and required the defendant to challenge the second time, before the state exercised the right, holding that upon his failure to do so, the defendant would waive the privilege as to one juror; Held, That the rule adopted by the court was fair and equitable. Ib.
- 8. Where a person called as a petit juror in a criminal case, being interrogated as to cause, stated that he had heard considerable in relation to the case, but had not formed an unqualified opinion in relation to the guilt or innocence of the defendant, from what he had heard; that he had formed an opinion as to the guilt or innocence of the defendant, that if what he had heard, and upon which he had formed his opinion, should be proved upon the trial, he had now an opinion made up; that he did not think he had any prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and testimony, and that he had no bias on his mind, which would influence his mind as a juror; and where the defendant then challenged the juror for cause, which challenge was overruled by the court; Held, That the challenge was properly disallowed. The State v. Sater, 420.
- 4. In a criminal case, it is sufficient cause of challenge to a petit juror, on the part of the state, that he testifies under oath, that he thought he had formed or expressed an unqualified opinion, or belief, that the de-

fendant was guilty or not guilty, of the offense charged; and it need not appear, in order to constitute a good cause of challenge, that the opinion or belief, formed or expressed by the juror, was in favor of the prisoner. The State v. Shelledy, 477.

- 5. The question as to the propriety of recalling a petit juror, who has been challenged, and excused from the jury box, for the purpose of permitting the other party to cross-examine him, and thus disprove the challenge, is within the discretion of the district court; and that discretion will not be controlled by the supreme court, unless it be shown to have been greatly abused. 16.
- 6. In a criminal case, it is sufficient cause of challenge, by the state, that a petit juror had formed an unqualified opinion; and no useful purpose is obtained by allowing the juror to state whether the opinion was favorable or unfavorable to the state. Ib.
- 7. In the absence of any statutory direction, the order of challenging petit jurors, and the mode of proceeding in filling up the panel, is left to the discretion of the district court; and unless there has been gross abuse of this discretion, there is no call for the interference of the appellate court. (WRIGHT, C. J., dissenting) Ib.
- 8. In the absence of any rule of law upon the subject of challenging petit jurors, and filling up the panel, it is to be presumed that the district court has adopted a rule of its own, and that the same has been followed in impanneling the jury; and where this has been done, no such prejudice has resulted as to require a reversal of the judgment, unless the discretion of the court in the premises is shown to have been greatly abused. (WRIGHT, C. J., dissenting.) 16.
- 9. Where in a criminal cass, a petit juror was challenged by the state, on the ground of implied bias, and being sworn as a witness for the purpose of proving the challenge, stated that he had formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty of the offense charge; and where the defendant asked the juror whether the unqualified opinion that he had formed was favorable or unfavorable to the state—which question the court refused to permit the juror to answer, and decided that the testimony was sufficient, and allowed the challenge; Held, That there was no error in the ruling of the court. Ib.

CITY.

- 1. The general assembly may provide, that the authority of a city shall not be extended over new territory, but upon the expressed consent of the people of the city. Morford v. Unger, 82.
- 2. Where the owner of land adjoining a city or town, lafs the same off into lots, and invites purchasers or settlers to occupy it with dwellings or otherwise, he cannot object to a law extending the authority of the local government, over him and his land so laid out and occupied. *Ib*.
- 3. But where the land is vacant, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement of the city limits, such an act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to the city, to tax the land to a certain distance outside of its limits; and

- is, in effect, the taking of private property, without compensation, within the spirit and meaning of the constitution. *Ib*.
- 4. In such a case, the force and effect, and obvious intent of the act, is to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government, furnishes no legitimate basis for the act. *Ib*.
- 5. The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is a legitimate exercise of legislative power, while an indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, is without authority. B.
- 6. The supreme court cannot take judicial notice of the provisions of a city ordinance. Garvin v. Wells, 286.

CONSIDERATION.

1. A purchaser of real estate at a sheriff's sale, where there is no fraud, cannot resist the payment of the purchase money, upon the ground that the judgment debtor had no title, or a defective one, and, therefore, that the bid was without consideration. Cameron v. Logan, 434.

CONSTITUTION.

- 1. The object of the act entitled "an act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, (Laws of 1856, 49), is sufficiently expressed in its title; and the said act is not in violation of section 26 of the third article of the constitution of 1846, which provides that "every law shall embrace but one object, which shall be expressed in its title." Morford v. Unger, 82.
- 2. Where the business of the general assembly, at a special session convened by the governor, is not restricted by some constitutional provision, it may enact any law at such special session, that it might at a regular session. The powers of the general assembly not being derived from the governor's proclamation, it is not confined to the special purposes for which it may have been convened by him. Ib.
- 3. The seventh section of the act entitled "an act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, which provides that the act shall take effect from and after its acceptance by the city council of Muscatine, and its publication at the expense of the city, is not a delegation of its powers by the general assembly to the people, or to any other tribunal, and does not render the act invalid under the constitution of 1846. *Ib.*
- 4. The right of the general assembly to create corporations for municipal purposes, conferred by the constitution of 1846, is not made to depend upon the consent of the inhabitants, or proprietors of the land, on which the proposed city or town is situate. *Ib*.
- 5. So, the power of imposing a local government upon a town or city, includes the power of ascertaining the extent of the corporation and its just boundaries, as well as the powers to be vested in the local government; and among the powers deemed essential to the objects of the corporation, is that of levying such reasonable taxes upon the property within its limits as may be necessary for such local purposes as the corporation is authorized to accomplish. Ib.



- 6. But where the land is vacant, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement of the city limits, such an act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to the city, to tax the land to a certain distance outside of its limits; and is, in effect, the taking of private property, without compensation, within the spirit and meaning of the constitution. 1b.
- 7. In such a case, the force and effect, and obvious intent of the act, is to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government, furnishes no legitimate basis for the act. *Ib*.
- 8. The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is a legitimate exercise of legislative power, while an indefinite or unreasonable extension, so as to embrace lands and farms, at a distance from the local government, is without authority. Ib.
- 9. The act entitled "An act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, takes private property for public use, without compensation, and is unconstitutional and void. Ib.
- 10. A party accused of crime, has rights which the law recognizes and protects, and the constitutional command that a person shall not be twice put upon trial for the same offense, cannot be trified with, and is not subject to the arbi-trary will of either the public prosecutor or the court. The State v. Callendine, 288.

CONSTRUCTION.

1. The proper construction of an instrument of writing and the meaning of the words used, is to be determined by the court. Pickerell v. Curson, 544.

CONTRACT.

- 1. A written agreement may be varied by evidence of a subsequent parol agreement, additional and suppletory to the original contract, and upon a new consideration. Willey v. Hall, 62.
- 2. So, it may also be shown by parol evidence, that the parties to a written contract, by a parol contract subsequent to the written one, abandoned the latter, except so far as applicable to the new parol agreement.
- 3. Where one party hires himself to another for a given period of time and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of the services p rformed, as upon a quantum meruit, without showing that he performed his entire contract, or that he left the service of his employer for good cause. Pixler v. Nichols, 106.
- 4. But in such a case, where the contract is broken by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to set up in defense the breach of the contract, for the purpose of reducing the damages, or showing that nothing is due, and to deduct what it will reasonably cost to procure a completion of the whole service, as well as any damages sustained by reason of a non-fulfilment of the contract. Ib.



- 5. And in such a case, if it is found that the damages are equal to. or greater than, the value of the services rendered, and that the employer, having a right to the performance of the whole contract, has not received any beneficial service, the employed is not entitled to recover. Ib.
- 6. Where a party seeks to recover for work and labor performed under a special contract, which he sets out in his petition, the defendant may show that the work was performed under a special contract differing from that declared upon by the plaintiff. Young v. Jones, 219.
- 7. Where a plaintiff claimed of the defendant \$164 50, and averred that at the special instance and request of defendant, he worked for him ninety-four days, and defendant promised to pay him therefor, \$1 75 per day—all of which was denied by the answer; and where, on the trial, the defendant offered to prove that the work done by plaintiff was done under a special contract, by which he was to pay the plaintiff \$75,00—which testimony was rejected by the court; Held, That the evidence was admissible. Ib.
- 8 Where in an act on to recover a balance due on a contract for building a school-house, a copy of which contract was attached to the petition, and was signed by the secretary of the district, the averments of which petition were denied by the answer, the plaintiff first offered in evidence the instrument of writing attached to the petition which was objected to, and excluded by the court; and where the plaintiff then called witnesses, and proposed to prove that he had called upon the directors of the school district for the contract, or a copy thereof, to work by in building the school-house, and that the directors delivered to him the instrument, and told him to work by the same, in building the house; and where the plaintiff proposed to offer the said instrument in evidence, as the contract between the parties, all of which evidence was excluded by the court; Held, That the court erred in excluding the evidence. Pierce v. School District No. Two, &c., 277.
- 9. Where an agreement has been made in good faith, with the express intention of settling prior disputes, the parties cannot go behind it; and a purchaser from one of the parties, with notice of the contract, takes subject to the settlement. Stewart et al. v. Chadwick et al., 463.
- 10. Where W. and C. each claimed a "claim" right in mineral land, and C., and the administrator of W., entered into an agreement, by which the said C. agreed to give to the said W's estate one-sixth part of all mineral raised upon the land; that he would enter the land from the United States, and was to receive the surface, or soil of said property; that if he worked the ground, he would pay to said estate one-sixth of the mineral; and that if the estate worked or discovered any mineral, it was to have the privilege to do so, without paying any part to any person; Held, 1. That C. was to hold the soil, or surface—the agricultural use of the land—and that the estate or heirs of W. held the mineral right; 2. That C., when he caused the land to be entered, held the mineral right in trust for the heirs of W. 15

CONTINUANCE.

In an affidavit for a continuance, on the ground of the absence of a
witness, it is not sufficient to state that a party has used due diligence to
obtain the testimony; but what has been done should be set forth in the
affidavit, that the court may judge of the diligence. Thurston v. Cavenor,
165.

- 2. Where an affidavit for a continuance, on the ground of the absence of a witness, stated that the witness is a resident of P. county, (the place of the trial); that he is now temporarily absent, but where he is, affiant does not know; that on a day named, (about a month before the commencement of the term), a subpœna was issued; that it was returned on the third day of the term, "not found;" that up to that time, affiant did not know but that said witness had returned, and had been served; and that affiant had used due diligence to obtain the attendance of said witness, &c.; Held, That the affidavit was insufficient. Ib.
- 8. Where a party asks for the continuance of a cause, on the ground of the absence of a witness, whose residence he does not know, he should show either that he has not had time to ascertain the residence of the witness, or that he has used proper diligence to ascertain his residence. James v. Arbuckle, 272.
- 4. Where in an action commenced before a justice of the peace, it appears that no defense was made before the justice, no object is to be gained by granting a continuance in the district court, on appeal, on the ground of the absence of a witness. *Ib*.
- 5. Action commenced before a justice of the peace, in April, 1856, to which the defendant made no defense, and judgment was rendered against him. On appeal, and in September, 1857, the defendant filed in the district court an affidavit for a continuance, on the ground of the absence of a witness, stating in his affidavit, "that sain witness resides somewhere in the state of Illinois, but the county I am not able to state at present," which application was overruled; Held, that the continuance was properly refused. Ib.
- 6. The act entitled "an act to amend section 1763, and amendatory of the law providing when cases in courts of record shall be tried," approved March 22, 1858, was not designed to continue every cause to the second term after its commencement, but to continue the trial on contested cases, but not those in which there was a default, or in which the whole cause of action was admitted. Duncan v. Hobart et al., 387.
- 7. Where it appeared from the record of a cause, "that heretofore, to-wit: on the 28th of May, 1858, an amended petition was filed," and that the cause had been tried at a former term, when the verdict was against the defendant, but the judgment was arrested and a new trial granted, and thereupon the plaintiff filed the said amended petition; and where, it being at least the second term after the commencement of the suit, the defendant claimed that he was entitled to a continuance under the act entitled "an act to amend section 1763 of the Code, and amendatory of the law providing when causes in courts of record shall be tried," approved March 22, 1858; Held. That the defendant was not entitled to a continuance. Drummond v. Stewart, 841.
- 8. An affidavit for a continuance, on the ground of the absence of witnesses, should state their residence, the particular facts expected to be proved by them, and that the affiant knows no other witness by whom the facts can be so fully proved. The State v. Sater, 420.
- 9. Where a party indicted for stealing a horse, filed his affidavit for a continuance, on the ground of the absence of witnesses, and after stating the names of the witnesses, alleged that he expected to prove by said witnesses, that he did net steal the horse, as charged in the indictment; that at the time said horse was stolen, he was at another and different place; that he expected to prove by them other facts which would establish his innocence; and that he could not prove said facts so fully by any

Vol. VIII.—74

other witnesses; which application was overruled; *Held*, That the continuance was properly refused. *Ib*.

- 10. An affidavit for a continuance, on the ground of the absence of a witness, which does not show that the facts expected to be proved by the witness, are material and relevant, nor that the defendant knows no other witness by whom the same facts can be so fully proved, is insufficient. The State v. Williams, 588.
- 10. Where an affidavit for a continuance in a criminal cause, on the ground of the absence of witnesses, fully complies with the requirements of section 1766 of the Code, the continuance should be granted; and the fact that the absent witnesses reside out of the state, furnishes no reason for refusing the continuance. The Stace v. Barrett, 536.

COSTS.

- 1. Section 1811 of the Code, does not apply to cases appealed from justices of the peace, by the party against whom judgment is rendered, and where upon trial in the district court, the judgment rendered against the appellant, is less than that rendered by the justice. Best v. Dean, 519.
- 2. Where a defendant appeals from a judgment rendered by a justice of the peace, and the plaintiff in the district court, recovers a less judgment than was rendered by the justice, he is entitled to recover the costs made subsequent to the appeal. *Ib*.

COUNTERFEITING.

- 1. In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., it is not necessary to allege an intent to defraud any particular person or corporation; nor is it necessary to aver a felonious or willful intent to defraud. The State v. Callendine, 288.
- 2. In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., a copy of the bills should be set out in the indictment, or a reason given for not doing so. *Ib*.
- 3. Section 2630 of the Code, means a bill purporting to be issued by a company or bank named, which company or bank is, in fact authorized, &c., and not a bill purporting that the company or bank is authorized, &c. Ib.
- 4. Where an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., described the bills as follows: "Thirteen false, &c., bank bills, numbered 1566, 1559, 1570, &c., purporting to have been issued by a corporation duly anthorized for that purpose by the state of Illinois, to-wit: purporting to be bank bills of the bank of Belleville, state of Illinois, each of said bank bills being of the denomination of two dollars;" Held, That the bills were not sufficiently described.
- 5. An indictment under section 2634 of the Code, for having in possession false money, or coin counterfeited in the similitude of coin current in the state of Iowa, &c., need not allege that the coin was counterfeited in the similitude of the current coin of the United States; nor is it necessary to aver that the counterfeit coin was of any value. The State v. Williams, 533.



- 6. Under an indictment for having in possession false money, or coin not counterfeited in the similitude of coin current in the state, &c., it is not necessary for the jury, by their verdict, to find more than that the defendant is guilty as charged in the indictment; and where they do more, and there is any valid objection to their finding, it may be rejected by the court, and judgment rendered on the verdict of guilty. *Ib*.
- 7. An indictment for uttering, as true, a counterfeit bank bill, under section 2627 of the Code, need not allege an intention to defraud any particular person. The State v. Barrett, 536.
- 8. An indictment which charges the defendant with uttering, passing, and tendering in payment, a counterfeit bank bill, with intent to defraud, &c., does not charge more than one public offense, and is not in violation of section 2917 of the Code. *Ib*.
- 9. Where on the trial of an indictment for uttering a counterfeit bank bill, &c., the defendant objected to the bill offered in evidence, on the ground of variance in the name of the president; and the court, upon inspection, decided that it could not determine that there was a variance, and permitted the bill to be read to the jury; Held, That there was nothing to show that a variance existed of such a character as to exclude the bill from the jury. Ib.

COUNTY JUDGE.

- The county judge possesses the power to submit to a vote of the
 people of the county, the question whether the county will subscribe to
 the capital stock of a railroad company, whose road is to run through
 such county, and such a vote is not derogatory of the law. Games v. Robb,
 193.
- 2. Where an assignee, under an assignment for the benefit of creditors, files a bond as required by law, and also an inventory and appraisement of the assigned property, sworn to by two disinterested persons, the county judge possesses no power or authority, under the act entitled "an act to amend chapter 62, title 13 of the Code of Iowa, and to close up assignments for the benefit of creditors," approved January 29, 1857, to remove the assignee, and appoint a new one. Drain et al. v. Mickel, 438.
- 3. The power conferred upon the county judge, by section twelve of the act in relation to assignments for the benefit of creditors, approved January 29, 1857, is to be exercised when there is likely to occur a failure of the trust, and not where there is merely an imperfect performance of the duty prescribed. *Ib*.

COUNTY TREASURER.

- 1. Where in an action of trespass, a county treasurer justifies the taking of personal property, for the non-payment of taxes, under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, he need not set out, with a copy of the warrant, the tax list, nor a copy thereof. An averment, in his answer, of his readiness to produce the tax list, is all that is required. Games v. Robb, 193.
- 2. Where a county treasurer, in justifying an action of trespars, for the taking of personal property, states in his answer that he received the tax list for a given year, with the warrant of the county judge attached, in due form, he need not state more to show the authority under which the

list was made, and that he was authorized to collect the taxes within the limits of the county, in the manner prescribed by law. Ib.

- 3. Where taxes are levied under, and by virtue of, a vote of the people authorised by law, a failure on the part of those officers conducting the election, and those whose duty it is, by law, to make the entries, and give the notices, necessary to perfect the vote, will not make the county treasurer liable as a wrong-doer, in the collection of taxes levied under such vote, if authorized by a proper warrant. Ib.
- 4. Under sections 487, 488 and 492 of the Code, the tax-list, with the warrant of the county judge attached, completely protects the county treasurer against the irregular or illegal proceedings of the officers connected with the levy of the tax. 1b.
- 5. A county treasurer, as to justification in levying upon property for the non-payment of taxes, occupies the same position to all taxes, whether general or special; and his protection is as full and complete in the colection of special, as it is in that of general taxes, in reference to the illegality or irregularity of the assessment. *Ib*.
- 6. Where the law authorizes a submission to a vote of the people, as to the levying of a special tax, and there is such a submission in fact, and the result is declared in favor of the proposed tax, the county treasurer is not to be held liable for any failure of the county judge, or other officer, to comply with the directory provisions of the law regulating the manner of conducting the election, or their neglect in making the proper entries.
- 7. Where a tax is levied by a county judge, under section 81 of the act entitled "an act for the public instruction of the state," approved March 12, 1858, for the support of schools within the county, the county treasurer may lawfully collect the same. The Co. of Louisa v. Davison, 517.

CRIMINAL LAW.

- 1. Where several persons are jointly indicted for a joint trespass on two other persons, it is error to instruct the jury, that if the defendants struck one of the persons charged to have been assaulted, they are guilty of assault and battery, unless they struck in self-defense. The State v. McClintock, 208.
- 2. All who instigate and promote the commission of an unlawful act, are equally guilty with those who commit the act itself; and a person aiding and abetting the commission of an assault and battery, is as guilty as the others, although he did not strike himself. *Ib*.
- 8. Where two or more persons are indicted for an assault on two persons, they cannot be convicted of the joint offense, unless the jury find that the assault and battery was committed upon both of the persons named in the indictment. Ib.
- 4. The charge of an assault upon two persons is, in legal contemplation, so far different from a charge of assault upon one of them, that proof of the commission of the act in regard to one, does not sustain the indictment. 1b.
- 5. Where several persons are charged with a joint assault and battery on two persons, either of the defendants may be convicted for his own separate assault on the persons named in the indictment. Ib.
- 6. Under an indictment charging several defendants with a joint assault and battery on two different persons, neither of the defendants can

be convicted for an individual and separate assault and battery on one of the persons charged in the indictment to have been assaulted. Ib.

- 7. Where a party is charged with forging an indorsement on the back of an order or draft purporting to have been drawn by one bank upon another, proof of the existence of the bank is not required; nor is it necessary to aver the genuineness or validity of the instrument forged. The State v. Pierce, 231.
- 8. The language, spirit, scope and tenor of section 2643 of the Code, shows that it extends to cases for falsely making and uttering indorsements on any note, bill, order, or instrument, as well as to falsely making and uttering the body of the instrument itself. *Ib*.
- The essence of the crime of forgery consists in doing the act with the intention to defraud. Ib.
- 10. Where a writing is invalid on its face, it cannot be the subject of forgery, for the reason that it has no legal tendency to effect a fraud; but where the invalidity is to be made out by proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished. *Ib*.
- 11. In order to constitute the crime of forgery, it is not necessary that any person should have been defrauded in fact. The attempt to defraud, and the intention to do so is sufficient. Ib.
- 12. Where a party is put upon trial for a criminal offense, it is not within the scope of the authority of either the attorney for the state, or of the court, to take the case from the jury, of their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be newly presented; and such a proceeding amounts to an acquittal, and may be pleaded as such. The State v. Callendine, 288.
- 13. A party accused of crime, has rights which the law recognizes and protects, and the constitutional command that a person shall not be twice put upon trial for the same offense, cannot be trifled with, and is not subject to the arbi-trary will of either the public prosecutor or the court. Ib.
- 14. To permit either the court or the attorney for the state, to stop a criminal trial, and bind over or commit the accused, to answer to the same or another indictment, at a future time, because the testimony fails, or a witness is wanting, in consequence of his name not being upon the indictment, would be trifling with the accused to a degree which cannot be tolerated. 1b.
- 15. The provisions of chapter 176 of the Code, do not extend the powers of the court so far as to permit the court to arrest a criminal trial, and discharge the jury, because of the exclusion of a witners, and to hold the defendant to answer to a subsequent indictment for the same offense. *Ib*
- 16. Where to an indictment for having in his possession forged and counterfeit bank bills, with intent to defrand, knowing them to be counterfeit, the defendant filed a special plea, averring that at a former term of the court, he was legally and regularly indicted for the same offense, that he pleaded to the indictment, and issue was joined thereon; that a jury was regularly impannelled and sworn, and the trial progressed to the examination of one K. and one M., as witnesses on the part of the state, when, on motion of the court, the indictment was dismissed, and the defendant discharged from the same; and that said proceedings were a bar to further proceedings against him on the present indictment, to which plea a demurrer was sustained by the court; Held, that the court erred in sustaining the demurrer. Ib.

- 17. In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., it is not necessary to allege and intent to defraud any particular person or corporation; nor is it necessary to aver a felonious or willful intent to defraud. Ib.
- 18. In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., a copy of the bills should be set out in the indictment, or a reason given for not doing so. Ib.
- 19. Section 2630 of the Code means a bill purporting to be issued by a company or bank named, which company or bank is, in fact, authorized, &c., and not a bill purporting that the company or bank is authorized, &c. Ib.
- 20. Where an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, &c., described the bills as follows: "Thirteen false, &c., bank bills, numbered 1566, 1559, 1570, &c., purporting to have been issued by a corporation duly authorized for that purpose by the state of Illinois, to-wit: purporting to be bank bills of the bank of Belleville, state of Illinois, each of said bank bills being of the denomination of two dollars; Held, That the bills were not sufficiently described. Ib.
- 21. Neither the present nor the past statutes of this state dispense with the leading requisites of indictments. Ib.
- 22 To render a defendant liable under section 2709 of the Code, for lewdness, the indictment should charge that the parties were not married to each other. The State v. Clinch, 401.
- 23. Where on the trial of an indictment the defendant asked the court to instruct the jury as follows: "That verbal confessions of guilt are to be received from a single witness with caution;" which the court refused to give as asked, but gave in the following shape: "That verbal confessions of guilt, uncorroborated by circumstances, are to be received with great caution;" and where the defendant further asked the court to instruct: "That extra judicial confessions—that is, confessions made out of court—when testified to by but a single witness, and where the property is not traced to the possession of the accused, are not alone sufficient to convict;" which the court modified so as to make it read as follows: "That extra-judicial confessions, when testified to by but one witness, uncorroborated by circumstances," &c.; Held, That the modifications of the court did not essentially vary the principle embodied in the instructions. The State v. Wilson, 407.
- 24. It is the intent with which the injury is inflicted, or attempted, that constitutes the offense of an assault with intent to commit a great bodily injury; and when the intent is shown, that which would be an assault unaccompanied with the febonious intent, will be such when thus accompanied. The State v. Malcolm, 413.
- 25. Where under an indictment for an assault with intent to commit a great bodily injury, it appeared that the defendant was in a store-room, and while there some words passed between him and one O.—the person assaulted—that defendant slid off the counter with a bowie knife in his right hand, and threatened O. with violence, when he was caught and held for some time; that O. ran, and was soon followed by the prisoner, with the knife in his hand; that he was caught while in pursuit; that while in the house, he was not within ten feet, and when out of the house, not within fifty feet of said O.; that he did not attempt to throw the knife, but had to be held, in order to prevent his following up more closely said O.; and that he was very angry; and where the court instructed

- the jury as follows: 1. That if the defendant had a bowie-knife in his hand of sufficient capacity to inflict a great bodily injury upon O., and was only prevented from inflicting a great bodily injury upon him, by others, then he is guilty; 2. That if he had the intent, and means to inflict the offense charged, and was only prevented from inflicting the same, by others, the distance of defendant from O., is not material; 3. That if the jury should be of opinion, from the evidence, that the defendant had the means and ability to inflict a great bodily injury upon O., and find the defendant intended, and endeavored to inflict such injury, and would have done so, had he not been arrested and prevented by the interference of others, it will be their duty to find against the defendant; Held, That the instructions were correct. Ib.
- 26. In an indictment charging the defendant with knowingly resisting an officer, in attempting to execute legal process, it is not necessary to aver that the officer, at the time, informed the defendant that he acted under the authority of a warrant; nor need the indictment set forth at length the acts of the officer, or show that in making the arrest, he complied, in all respects, with the requisites of the statutes. The State v. Freeman, 428.
- 27. In serving a writ, an officer will be presumed to have discharged his duty, and where a party, who resists the officer, relies on the fact that he omitted to declare the authority under which he acted, it is proper matter of defense. *Ib*.
- 28. In an indictment for resisting an officer in the execution of legal process, the time of the commission of the offense is immaterial, and need not be proved as alleged; and where the time is alleged under a videlicet, it is nugatory, and not traversable, and if repugnant to the fact, does not vitiate the indictment, but the videlicet, itself, may be rejected as surplusage. Ib.
- 29. It is only an inconsistency in the material allegations, that will vitiate an indictment; and where the defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage, and disregarded. *Ib*.
- 30. Under an indictment for enticing away an unmarried female, under the age of fifteen years, from her father, &c., without their consent, for the purpose of prostitution, the defendant cannot show that the said female before said enticing, told him that she was over fifteen years of age. The State v. Ruhl, 447.
- 31. A party is liable for a wrongful act, where there exists a criminal intent, although the act done, is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense. Ib.
- 32. The words, "or other persons having the legal charge of her person," in section 2584 of the Code, do not mean that such person shall have all the power and authority over the child possessed by the parent, or legal-ly appointed guardian; nor do they mean the person who has the temporary charge, or a charge for a particular purpose—as a school-mistress or governess. Ib.
- 33. If otherwise made out, the crime will be complete, if the enticing away was without the consent of a person who, with the permission of the parents, if living, was entrusted with the care, custody, charge, or control of the child, as an actual member of the family. *Ib*.
- 34. Where on the trial of an indictment for enticing away an unmarried female, under the age of fifteen years, &c., the evidence tended to show that the female had resided with her uncle, O., for about seven

years, as a member of his family, the court was asked to instract as follows: "That if she was living in the family of O., as a member of his family, and had no parent or guardian in the state, and was wholly under the protection and care of said O., then she was under the control of the said O. within the statute, provided she was under fifteen years of age at the time, and there by the consent of her parents, which consent may be proved by the relationship of the family, and the length of time she has been there, in the absence of other testimony," which instruction was was given by the court; and where the defendant asked the court to instruct as follows: "That if the child was not under the control of father or mother, any one who claimed to have such control must show that he has been legally appointed the guardian for that purpose, or that said child has been apprenticed," which instruction the court refused; Held, That there was no error in giving the one, and refusing the other instruction. Ib.

- 85. Where the parents of the female enticed away, are dead, and no guardian has been appointed, those with whom she resided as a member of the family, and who had her wholly under their care and protection, would have the "legal charge of her person," within the meaning of section 2584 of the Code. *Ib*.
- 36. The word "prostitution," in section 2584 of the Code, means common, indiscriminate, illicit intercourse, and not merely seduction, or sexual intercourse, confined exclusively with one man. Ib.
- 37. Where on the trial of an indictment for enticing away an unmaried female, &c., there was testimony of a purpose on the part of defendant, "to seduce and enjoy the body of the said female, and that he had taken her away in order to have carnal intercourse with her, and did so enjoy her person, but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution; and where the defendant asked the court to instruct the jury as follows: "That if the defendant only intended to obtain the body of the said famale, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution in the sense of the law," which instruction the court refused to give; Held, That the instruction should have been given. Ib.
- 38. Where two or more persons conspire together, to do an unlawful act, and in the prosecution of the design, an individual is killed, or death enaue, it is murder in all who enter into, or take part in the execution of the design. The State v. Shelledy, 477.
- 39. If the unlawful act be a trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a bare trespass, it will be murder in all, although the death happened collaterally, or beyond the original design. 1b.
- 40. The common law definition of manslaughter, has not been changed by the Code of Iowa. *Ib*.
- 41. Where on the trial of an indictment for murder, the court instructed the jury as follows: "Manslaughter is the unlawful and felonious killing of another, without malice, express or implied. It differs from murder in this—that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter—provided such unlawful act, or design, be not a fel-

- ony, because then, the law implies the existence of malice. But if the intent goes no further than to commit a bare trespass, it will be manslaughter; Held, That the directions of the court as to what constituted manslaughter, was as favorable to the defendant, as he could in reason require to be given. 1b.
- 42. Every person is presumed to contemplate the ordinary and natural consequences of his own acts; and declarations made at the time of the transaction, expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are, therefore, admissible in proof, like other material facts, as part of the res gester. Ib.
- 48. But where the declaration and the act are inconsistent, if the act goes beyond the declaration, or contradicts it, the presumption of intention is to be gathered from the acts of the party, upon the plain and obvious principle that the party must be presumed to intend to do that which he voluntarily and willfully does in fact do. 1b.
- Where on the trial of an indictment, in which the defendant and others were jointly indicted for the murder of one W., the court instructed the jury as follows: "That if the jury believe from the evidence that the defendant and others, formed the design of taking the life of the said W., whether by hanging or otherwise; that in pursuance of such design, the defendant and others went in a body to the house of the said W., armed and resolved, and prepared to resist all opposition; that they obtained possession by force or otherwise, of the body of said W., and bound the arms of the said W. so as to render him helpless; that after they had so obtained possession of the sald W., the said defendant, and those then engaged with him, or any one of them, in the presence and hearing of said W., avowed their purpose to take the life of the said W. by hanging or otherwise; that they forced the said W. into a back while thus bound, and started to the timber with him; that while on the road to the timber, and when on the banks of the lowa river, they cast the said W., while thus bound, into said river, from the said hack, or compelled the said W., by threats, or otherwise, to jump from said hack into said river, and they then and there permitted him to drown, while standing by, and made no effort to rescue the said W., if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree; Held, That the instruction was correct.
- 45. And where in the same case, the court further instructed the jury as follows: "That if the jury believe from the evidence, that the defendant and other persons formed the design of committing personal violence upon the body of the said W., as by lynching or otherwise, but did not design to take his life; that in pursuance of said design, they went in a body to the house of said W., armed and recolved, and prepared to resist all opposition; that they obtained possession of the person of the said W. and bound his arms so as to render him helpless; that they forced the said W. into a hack, while thus bound, and started to the timber with him : that before and after they started, one or more thus engaged, in the presence of W., declared that he should be hung, or that he should die before surdown, or otherwise threatened the life of said W.; that while on the road to the timber, and when on the bank of the lows river, the said W., while thus bound, and in the custody of the said defendant, and others then engaged with him, entertained a re-sonable and well-grounded apprehension an apprehension justified by the circumstances—that the said defendant and others then engaged with him, intended to commit personal violence on the said W., or to take the life of the said W., and under that apprehension, sprung from the carriage into the said river, hoping either to escape the threatened violence, or apprehended death, and was then and Vol. VIII.—75

Digitized by Google

- there drowned—the said defendant, and others then engaged with him, standing by, neither rescuing, nor offering to rescue, the said W., then the said defendant is guilty of murder in the second degree;" *Held*, That the instruction was sustained by authority. *Ib*.
- 46. Where death ensues in consequence of the unlawful act of another, it is not necessary that the fatal result should have sprung from an act of commission; but if defendant omitted any act incumbent on him from which death resulted to the deceased, if there was no malice, it is manslaughter—if there was malice, it is murder. Ib.
- 47. Under section 2721 of the Code, which prohibits the keeping of gambling houses, the offense is as complete, if the house is kept for that purpose for one day, as if kept for a year. The State v. Crogan, 523.
- 48. To show that the place charged is kept as a gambling house, within the meaning of section 2721 of the Code, it may be shown that it was thus used continuously, but it is not necessary to charge such use in the indictment. 1b.
- 49. In an indictment for keeping a gambling house, it is not necessary to state the location of the house kept, further than to show the proper venue; but where the indictment alleges that the building is situate on a particular lot, the proof must sustain the allegation. *Ib*.
- 50. Where the place is stated in an indictment, as a matter of local description, and not as venue, it is necessary to prove it as laid. 1b.
- 51. An instruction on the trial of an indictment for murder, which omits the element of premeditation, in defining the crime of murder of the first degree, is erroneous. The State v. Johnson, 525.
- 52. Fouts v. The State, 4 G. Greene, 500, commented on and overruled. Ib.
- 53. Where on the trial of an indictment for murder, the court charged the jury as follows: "If you are satisfied from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree;" and where the bill of exceptions recited that the other instructions pointed out the difference between murder of the first and second degree, and manslaughter, but the bill did not show what those instructions were; Held, That it did not appear from the record, that the defendant was not prejudiced, by the omission of the word "premeditated," in the said instruction. Ib.
- 54. Where on the trial of an indictment for murder, the counsel for the prisoner claimed and insisted that the defendant was not guilty, or if so, that the offense was murder of the first degree, and thereupon the court, without objection, charged the jury as follows: "The form of your verdict will be as follows, if you find the defendant guilty: we, the jury, find the defendant guilty of murder in the first degree; or, if you find the defendant not guilty, you will say, we find the defendant not guilty; "Held, 1. That the defendant could not complain of the issue his counsel had presented; 2. That the instruction was not erroneous under the circumstances. Ib.
- 55. Where on the trial of an indictment for murder, the court, in relation to the dying declarations of the deceased, instructed the jury as follows: "If you receive them as true, it will be your duty to find the defendant guilty of murder in the first degree, because they show that it was done, either in the perpetration of, or attempt to perpetrate, a robbery;" and where the court, in response to an interrogatory of the jury,

further held: "That if you should believe that the deceased was mistaken as to the object the defendant had in killing, (i. e., for his money), and that all the other declarations were true, and are satisfied, from the circumstances detailed by the testimony, that the murder was willful, decliberate, and committed with malice aforethought, the verdict should be for murder in the first degree. You can find a verdict of guilty of murder in the second degree, if the murder was wilful, and with malice aforethought, though not delibearate and premeditated, provided you are not satisfied that it was committed in the perpetration, or attempt to perpetrate, a robbery. In inquiring into what what was said by the deceased, on the subject of defendant's object in inflicting the wound, you may inquire whether he meant to say, that a robbery had been committed, or whether he referred to the intention of defendant in making the assault;" Held, That taking the instructions together, the first was not objectionable, or at least, not so much so as to alone justify a reversal of the cause. Ib.

- 56. An indictment under section 2634 of the Code, for having in possession false money, or coin counterfeited in the similitude of coin current in the state of Iowa, &c., need not allege that the coin was counterfeited in the similitude of the current coin of the United States; nor is it necessary to aver that the counterfeit coin was of any value. The State v. Williams, 538.
- 57. Under an indictment for having in possession false money, or coin counterfeited in the similitude of coin current in the state, &c., it is not necessary for the jury, by their verdict, to find more than that the defendant is guilty as charged in the indictment; and where they do more, and there is any valid objection to their finding, it may be rejected by the court, and judgment rendered on the verdict of guilty. *Ib*.
- 58. An indictment for uttering, as true, a counterfeit bank bill, under section 2627 of the Code, need not allege an intention to defraud any particular person. The State v. Barrett, 536.
- 59. An indictment which charges the defendant with uttering, passing and tendering in payment, a counterfeit bank bill, with intent to defraud, &c., does not charge more than one public offense, and is not in violation of section 2917 of the Code. *Ib*.
- 60. Where on the trial of an indictment for uttering a counterfeit bank bill, &c., the defendant objected to the bill offered in evidence, on the ground of variance in the name of the president; and the court, upon inspection, decided that it could not determine that there was a variance, and permitted the bill to be read to the jury; Held, That there was nothing to show that a variance existed of such a character as to exclude the bill from the jury. Ib.
- 61. In an indictment for larceny, in stealing a bank note, it is sufficient to describe it as a promissory note, for the payment of money, commonly called a bank note, purporting to be issued by a bank, (naming it,) for the payment of a certain sum of money, still due and unpaid, and of a certain value. The State v. Bond, 540.
- 62. Bank notes are made the subject of larceny, by the statutes of the state of Iowa. Ib.
- 63. Where under an indictment for larceny, in which the defendant was charged with stealing certain money and bank notes, the court instructed the jury as follows: "That if a man, under the honest impression that he has title to the property, takes it into his possession, it is not larceny; but if there be an act of concealment, it indicates a knowledge that his

claim is unfounded. If the circumstances show that the defendant acted in good faith, under a claim of title in himself, he is exempt from the charge of larceny, although his claim has no foundation in right. The cases in which this principle has been settled, have been those in which property other than money, was the subject of the taking, and where a title to the specific article was set up. It will be necessary for us to inquire how far the principle will apply, where money is taken. No claim of title to the particular money taken, is alleged to have been set up; but the claim was, that the amount taken was due in services. If the claim had been asserted to C. & R., (the persons from whom the property was taken), before the time of the taking, and there was no evidence of concealment, the fact that money was taken, would not vary the principle. It would not be larceny. If the jury are satisfied, from the testimony, that the defendant was in the employment of C. & R.; that there was nothing due him for services; that he secretly took this money, belonging to them, and from their money-drawer, with the intention to keep it, and convert it to his own use; and that he made the entries in the books, and placed the letter, setting up a claim for services, in them, intending to leave the state, and further intending that the books and entries should not be discovered until after he left the state, it will be your duty to find him guilty. If the jury believe from the testimony, that the defendant took the money on Saturday, and at a time when, in the ordinary course in which the business of C. & R. was conducted, the taking would not be discovered until Monday morning, and that defendant intended to leave on Saturday, and intended that the letter which he left in the books, should not be discovered until after his departure, it will be your duty to find him guilty;" Held, That the instructions were sufficiently favorable to the defendant. Ib.

CUSTOM.

- 1. Where it is the custom of a creditor, known and acquiesced in by the debtor, to charge interest on accounts, after a certain time, or where such is the uniform usage of the trade, such facts, if proved, are evidence of an agreement, and interest will be allowed. Veiths v. Hagge, 163.
- 2. Where in an action on an account for goods seld and delivered, the party claimed interest on the account from the end of the year during which the same accrued, and offered to prove, that by the usage and mode of dealing between him and his customers, having open accounts, all such accounts were considered due at the end of the year, and interest on the same, from that time, was charged to his customers, and that such custom was known to the defendant, which evidence was rejected by the court; Held, That the evidence was admissible; and that it should have been left to the jury to determine, whether the facts shown amounted to an agreement between the parties, that the account was to be considered due at the end of the year, and that interest was to be charged after that time. Ib.

DAMAGES.

- 1. It is not true, as a general proposition, that in slander, the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages. Armstrong v. Pierson, 29.
- 2. Where in an action of slander, the court, after stating the different kinds of damages, instructed the jury as follows: "That compensatory damages are given where the words were spoken without malice, but un-

der circumstances which show a want of caution, and a proper respect for the rights of the plaintiff. Compensatory damages are such as will pay the plaintiff for his expense and trouble in carrying on the suit, and disproving the slanderous words;" and where the court afterwards instructed the jury, "that the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages;" Held, That the latter instruction, taken in connection with the definition of compensatory damages, given by the court, was not erroneous. Ib.

- 3. A judgment for damages caused by the flowing of lands by a mill dam, which were not foreseen and estimated by the jury of inquest under a writ of ad quod damnum, affords no ground for an injunction against the owner of the mill dam, nor does it affect his rights under his license. Lummery v. Bradley, 33.
- 4. An action before a justice of the peace, in which the plaintiff claimed to recover for the work and labor of his son, for five and a half months, at ten dollars per month, &c. The defendant answered in writing denying the plaintiff's claim, and averring that he contracted with plaintiff for the hire of the services of his son, for one year, at the price of \$75 00; and that the son worked five and a half months, when he was taken away by the plaintiff, who refused to permit him to work for defendant any longer, and claiming damages for the breach of the contract. To this answer no replication was filed. On appeal to the district court, the plaintiff filed a demurrer to so much of the answer as alleged that the contract was for the labor of the son for one year, &c., which demurrer was sustained, and so much of the answer stricken out; Held, That by sustaining the demurrer, the defendant was deprived of his right to show that he had sustained any damages by reason of the failure of the plaintiff to perform his part of the agreement, which damages he had the right to set off against the plaintiff's claim for compensation for the labor of his son for five and a half months, and that the proceeding was erroneous. (WRIGHT, C. J., Lowen v. Crossman, 825. dissenting.)
- 5. In an action for damages, for failing to obey a subpœna, the question whether it was served or not, is a matter of proof for the plaintiff on the trial. *McCall* v. *Butterworth*, 329.
- 6. In such an action, the return of service upon the subpœna, is not conclusive upon the parties; and the plaintiff is entitled to show on the trial, as a matter of fact, independent of the return of the officer, that the writ was duly and legally served. Ib.
- 7. In an action for damages for failing to obey a subpœna, it is not indispensably necessaay that the return of the officer, should show that a copy of the subpœna was delivered to the witness. 1b.
- 8. Where a witness is a party to a suit, in which his attendance is required, no technical objection to the regularity or sufficiency of the subpœna, should be suffered to prevail, in a suit to recover damages for failing to obey the same. Ib.
- 9. It is error to set aside a petition for damages for failing to obey a subpœna, on motion or demurrer of the defendant, for the reason that no service of the subpœna had been made upon the defendant, which he was bound to obey. Ib.
- 10. In an action of right commenced against the ancestor, and to which the heirs are made parties after his death, the heirs are not liable for damages for the rents and profits, while the ancestor was in possession of the premises. They are only liable for such time as they are shown to have been in in possesion. Cavender v. Smith et al., 360.

- 11. In such a case, if the plaintiff seeks to recover damages from the ancestor, his administrator should be made a party, with the heirs, or a separate action should be instituted against him. *Ib*.
- 12. Where a vendor becomes liable to a vendee, for the defective quality of goods sold, whether his liability arises through fraud or breach of contract, the measure of damages is the difference in value between goods corresponding with the representations made, and those actually delivered; and the same rule applies where there has been fraudulent misrepresentations in the sale of real estate. Likes v. Baer, 368.
- 13. In an action to recover damages for fraudulent representations in the sale of real estate, it is not error to charge the jury that the measure of damages is the difference between the value of the land purchased of the defendant, as it was at the time of the purchase, and the sum that the land would have been worth at that time, if it had been such as it was represented to be by the defendant. Ib.
- 14. Upon appeal from an assessment of damages by a sheriff's jury, under the act granting to railroad companies the right of way, approved January 18, 1853, where it appears from the record that the jury were selected, and required to assess the damages done to each and every piece or tract of land in the county, in all cases not agreed upon with the owners of the land'—that the land owner was notified of the day when the assessment would be made—that on the day of the assessment he gave notice of an appeal, and filed his bond—and that, afterwards, he filed with sheriff his exceptions to the report of the jury—it is sufficiently shown that the owner of the land had refused to grant the right of way through his premises, and that the sheriff had power to have the damages assessed by a jury. The M. & M. R. R. Co. v. Rosseau, 373.

DEBTOR AND CREDITOR.

- 1. The creditor of one partner may levy upon the interest of his debtor in the partnership. Hubbard v. Curtis et al., 1.
- 2. But the creditors of the firm, are entitled to be first satisfied from the partnership fund, and the separate creditors from the individual funds. Ib.
- 8. This latter rule, however, is only applied where there is a deficiency in one of the funds. Ib.
- 4. Where an execution against a member of a firm, is levied upon the partnership property, the officer is not entitled to take possession of such joint property; nor where the interest of the debtor in the firm, is sold before a settlement of the partnership affairs, does the officer deliver over the property to the purchaser. Ib.
- 5. In such a case, the purchaser takes nothing more than an interest in the partnership, which is not tangible, and cannot be made available, except under an account between the partner and the partnership; and and the purchaser will be restrained from proceeding to obtain possession of the partnership property until such an account has been taken. 1b.
- 6. Where partnership property is levied upon to satisfy an individual debt of a member of the firm, a stay of the sale under the execution is not allowed, on the ground that the interests of the other partners will be affected by such sale, but is granted to ascertain and protect the rights of the joint creditors. Ib.

- 7. Nor is an account taken in such cases, solely to ascertain whether there is a separate interest in the debtor partner; but it being found that the joint effects are insufficient, or only sufficient, to meet the demands of the partnership creditors, the object is to protect the joint creditors, and direct the funds to their payment. Ib.
- 8. A debtor may secure one creditor in preference to another; but if he undertakes to dispose of all his property to his creditors, at one and the same time, he must do it in such a way, as to place all his creditors upon an equality, giving them all his property to be divided between them, in proportion to their respective demands. Burrows et al. v. Lehndorff, 96.

DECLARATION.

- 1. Every person is presumed to contemplate the ordinary and natural consequences of his own acts; and declarations made at the time of the transaction, expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are, therefore, admissible in proof, like other material facts, as part of the res gestæ. The State v Shelledy, 477.
- 2. But where the declaration and the act are inconsistent, if the act goes beyond the declaration, or contradicts it, the presumption of intention is to be gathered from the acts of the party, upon the plain and obvious principle that the party must be presumed to intend to do that which he voluntarily and willfully does in fact do. Ib.

DECREE.

- 1. An infant defendant is as much bound by a decree in equity against her, as a person of full age; and, consequently, if there be an absolute decree against a defendant who is under age, he or she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it—as fraud, collusion, or error. Ralston v. Lahee, 17.
- 2. To impeach a decree in equity, sgainst an infant, on the ground of fraud or collusion, the infant may proceed either by bill of review, or by original bill. To impeach it on the ground of error, the infant may proceed by original bill, and he is not obliged to wait, for that purpose, until he has arrived at the age of twenty-one years. Ib.
- 8. In ordinary cases, where an infant is allowed time, after her arrival at the age of twenty-one years, to show cause against a decree, the decree in such cases is deemed complete, but the infant has the time allowed to show cause against it. If no cause is shown, within the time specified, the infant is bound. Ib.
- 4. After the infant comes of age, and before the decree is made absolute, she may, as a matter of course, on motion, obtain leave to amend the answer filed by her guardian, or to put in a new one. By the new or amended answer, she may make a better defense, and support that defense by new evidence; and for that purpose, may file a bill of discovery.

 15.
- 5. An infant defendant, wishing to make a new defense to a decree in equity, must apply to the court as early as possible, after obtaining the age of twenty-one years; for if she is guilty of any lackes, her application will be refused. Ib.
- An infant defendant may either impeach a decree in equity, on the ground of fraud or collusion between the complainant and her guardian,



or she may show error in the decree. She may also show that she had grounds of defense, which were not before the court, or were not insisted on at the hearing; or that new matter has subsequently arisen, upon which the decree may be shown to be wrong. Ib.

- 7. Where an erroneous decree has been obtained against an infant, and the error is not in the judgment of the court, but in the facts on which the judgment is founded—as where there has been fraud or collusion between the complainant and the guardian ad litem, or where there has been any deception, or any surprise, upon the court, the infant may, either during infancy or afterwards, investigate the decree by a bill of review, or by original bill; and this, although the ground of complaint against the decree, is confined to error. Ib.
- 8. In such cases, the proceeding on which the decree is founded, is treated as fraudulent—it being considered fraudulent to take advantage of the incompetency of the infant to defend herself. Ib.
- 9. There can be no valid decree against an infant, by default, nor on the answer of a guardian. Ib.
- 10. But where in a proceeding to reach the equitable interest of a judgment debtor in real estate, against the debtor and his infant daughter, in whose name the title had been taken, the guardian ad litem of the infant, in his answer, admitted the judgment against the father—that execution issued thereon, had been returned "no property found"—that the father had no property out of which the judgment could be satisfied—that the said infant was the daughter of the said judgment debtor—and that the title to one of the lots in controversy, was in the said infant—and denied the other allegations of the bill; Held, That as the substantial matters admitted in the answer of the guardian, were matters of record, the court could not presume that the decree was rendered on the admissions of the guardian; and that those admissions did not prejudice the rights of the infant. Ib.
- 11. The fact that a guardian ad litem, at the time of his appointment, and at the date of the decree, was interested against the infant in the subject matter of the controversy, is not such conclusive evidence of fraud as to authorize the setting aside of the decree, for that reason alone, unless it is shown further, that the guardian made use of his position, to work some injury to the interest of the infant. Ib.
- 12. Where a decree has been rendered against an infant, and she afterwards succeeds in showing that it would not have been rendered, the court will place her as far as practicable, in the situation in which she was before the decree was made. Ib.
- 13. In a proceeding to set aside a decree in equity, and a sale under such decree, all the parties to the decree, and the purchaser at the sale, should be made parties defendant, and brought into court; and unless the is done, the court cannot properly adjudge the decree void. B.

DEFAULT.

- 1. An affidavit of a member of a partnership, stating that he had been absent, and for that reason was unable to prepare his defense, but containing no excuse as to the other partners, make no such showing as will justify the court in setting aside a default. Walker v. Clark et al., 474.
- Where an action was commenced in December, 1857, on two promissory notes, returnable to the February term, 1858, of the district court; and where at the said February term, the cause was communed to the en-

suing May term; and where at the said May term, the defendant was called and his default entered, and the cause continued to the September term for final judgment; and where on the day following that on which the default was entered, the defendant moved to set aside the default, which motion was supported by an affidavit, stating that the defendant "did not apprehend that the cause would be on the docket for that (the May) term; that notice was served upon him to appear at the February term; that he supposed another notice was necessary in order to get the cause before the court at that (the May) term; and that he had a good defense, stating it, which motion was overruled; and where at the September term, it was renewed under a motion for a rehearing, and at the same time the defendant asked-leave to file an answer, which he exhibited to the court, which motion was overruled, and the court refused to allow the answer to be filed; Held, That there was no error in the proceeding of the court. Andrus v. Clark, 475.

3. Where it does not appear that the district court has improperly exercised the discretion vested in it, in refusing to set aside judgment by default, the judgment must be affirmed. King v. Kinney, 521.

DEMURRER.

- 1. A demurrer admits facts which are well pleaded, but not the law as claimed by the pleader, nor the inference or conclusion drawn by him. Games v Robb, 193.
- 2. A demurrer to the petition is waived by an answer; and the defendant, after answering, cannot assign for error in the appellate court, the judgment of the court overruling the demurrer. Cameron, Adm'x v. Armstrong, 212.
- 3. Where a defendant, after his demurrer to the petition is overruled, files an answer, with pleas of tender and set-off, and subsequently withdraws his plea of set-off, leaving his answer and plea of tender on file, he is not in a position to assign error on the overruling of the demurrer. Ib.
- 4. Where a party amends his pleadings, after a demurrer has been sustained to his answer, he waives the right to object in the appellate court to the ruling of the court in sustaining the demurrer; and where the second answer admits, under oath, the correctness of the plaintiff's claim, this rule should be rigorously enforced. Duncan v. Hobart et al., 337.

DEPOSITION.

- 1. A defective notice of the taking of a deposition, is obviated by an appearance and cross-examination of the witness. Nevanv. Roup, 207.
- 2. Where it appears from a deposition, that the witness is a non-resident of the state, it shows a sufficient reason for taking the same; and it will not be suppressed, although the witness may answer that he intends to be personally present at the term of the court at which the cause is to be tried, unless it be shown that the witness is present in court. Ib.
- 3. Where on the taking of a deposition before the clerk of the district court of Iowa county, on the 15th of May, 1858, the witness stated that he resided in St. Louis, Missouri, and that he intended to be present in attendance at the next term of the said lowa county district court, if alive and well; and where the next term of said court would be held on the first Monday of November next ensuing; Held, That the deposition showed a sufficient reason for taking the same, 16.

Vol. VIII.—76

- 4. Where notice of the taking of a deposition in Mount Pleasant, Henry county, on the 26th of July, 1858, was served on the attorney of the defendant, in Des Moines county—a distance of thirty miles from the place where the deposition was to be taken—on the 21st of July; Held, that the notice was not sufficient. Richardson & Co. v. The Burlington & Mo. Ricer R. R. Co., 260.
- 5. Where in an action by the indorsee of a promissory note, against the maker, dated the first of September, payable in ten days after date, and indorsed on the 13th of the same month, to which the defendant pleaded a set-off against the payee, the court suppressed a deposition designed to prove the set-off; Held, That the set-off could not prevail against the indorsee, and that the deposition was properly suppressed. Goodpaster v. Voris et al., 834.

DOWER.

- 1. The land was located with a military land warrant, issued by the United States to O. M. B., the husband of complainant. The warrant was sent from Ohio to M. of Johnson county, lowa, by one E., with directions to sell it. It was not assigned, and was not by the law in force at that time, assignable. M. sold it to J. B., one of the respondents, on a credit, and located it for him on the land, in the name of O. M. B., with the understanding that E. should make a deed in fee simple when the money was paid for the warrant, according to agreement. M. did not know O. M. B., and did not act for him in the business. After the location of the warrant by M., O. M. B. executed to E. atitle bond for the conveyance of the land to him, on condition that E. should, by a day named, pay to O. M. B. the sum of \$160.00 specified as the price agreed therefor. O. M. B. died January 16, 1853. J. B. obtained a decree against E. for a conveyance; and afterwards ascertaining that the legal title was in the heirs of O. M. B., who had died in the meantime, he obtained a decree against the administrator and heirs of O. M. B., for a conveyance by them; Held, That the widow of O. M. B. was entitled to dower in the land. Burke v. Barron et al., 182.
- 2. A widow's right of dower in the real estate of her husband accrues at the time of his death, and becomes a vested right before assignment, which the general assembly, by a subsequent statute, can neither reduce nor take away. Ib.
- 8. The act entitled "An act to amend chapter eighty-three of the Code," approved January 24, 1853, by which section 1394 is repealed, does not refer to, and include, rights of dower accrued previous to its enactment. Ib.
- 4. A right of dower, where the dower is unassigned, cannot be set up as a defense in an action of right, against the person holding the fee of the land. Cavender v. Smith et al., 860.
- 5. Where in an action of right against the widow and heirs of S., in which the plaintiff claimed under a judgment against the husband and father, the widow pleaded that she was the wife of the said S. at the time of the recovery of the judgment, and continued so to be till the time of his death, and that she is entitled to dower in the premises, and to the possession of the dwelling-house until her dower is assigned; to which the plaintiff demurred, for the reason that the facts stated in the plea constituted no defense, and that the widow's title to dower is inchoate, until it is set off, which demurrer was sustained; *Held*, That the demurrer was properly sustained. *1b*.

- 6. While section 1397 of the Code gives a widow the right to petition for an assignment of her dower, at any time after twenty days from the death of the husband, yet this right does not control the right of possession, which remains as at common law. Ib.
- 7. Where a widow's right to the possession of real estate comes under the law of dower only, and not under the law in relation to the homestead, she cannot claim possession by virtue of the latter. Ib.
- 8. In an action of right against the heirs of her husband, a widow, whose dower is unassigned, is not a proper party defendant; and if made a party, the judgment recovered by the plaintiff cannot affect her right of dower. Ib.
- 9. At no time during our existence as a territory, was dower changed from what it was under the organic acts of Wisconsin and Iowa, or different from what it was at common law. *Pense* v. *Hixon*, 402.
- 10. Independent of a statute declaring that it might be thus extinguished, a sale on execution, or other judicial sale, under a judgment against the husband, would not bar the wife's right of dower. Ib.
- 11. The husband was seized of the lands in controversy after, and during, his marriage with plaintiff. In 1841, judgment was recovered against him, under which, in 1844, the lands were sold to the person under whom defendant claims. The husband died in 1856, and the wife never relinquished, by any act of her's, her right of dower; Held, That the wife was entitled to dower in the premises. Ib.

ENTICING AWAY AN UNMABRIED FEMALE.

- 1. Under an indictment for enticing away an unmarried female, under the age of fifteen years, from her father, &c., without their consent, for the purpose of prostitution, the defendant cannot show that the said female before said enticing, told him that she was over fifteen years of age. The State v. Ruhl, 447.
- 2. A party is liable for a wrongful act, where there exists a criminal intent, although the act done, is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense. Ib.
- 3. The words, "or other persons having the legal charge of her person," in section 2584 of the Code, do not mean that such person shall have all the power and authority over the child possessed by the parent, or legally appointed guardian; nor do they mean the person who has the temporary charge, or a charge for a particular purpose—as a school-mistress or governess. Ib.
- 4. If otherwise made out, the crime will be complete, if the enticing away was without the consent of a person who, with the permission of the parents, if living, was entrusted with the care, custody, charge, or control of the child, as an actual member of the family. *Ib*.
- 5. Where on the trial of an indictment for enticing away an unmarried female, under the age of fifteen years, &c., the evidence tended to show that the female had resided with her uncle, O., for about seven years, as a member of his family, the court was asked to instruct as follows: "That if she was living in the family of O., as a member of his family, and had no parent or guardian in the state, and was wholly under the protection and care of said O., then she was under the control of the said O. within the statute, provided she was under fifteen years of age at the time, and there by the consent of her parents, which consent may be



proved by the relationship of the family, and the length of time she has been there, in the absence of other testimony," which instruction was given by the court; and where the defendant asked the court to instruct as follows: "That if the child was not under the control of father or mother, any one who claimed to have such control must show that he has been legally appointed the guardian for that purpose, or that said child has been apprenticed," which instruction the court refused; Held, That there was no error in giving the one, and refusing the other instruction. Ib.

- 6. Where the parents of the female enticed away, are dead, and no guardian has been appointed, those with whom, she resided as a member of the family, and who had her wholly under their care and protection, would have the "legal charge of her person," within the meaning of section 2584 of the Code. 16.
- 7. The word "prostitution," in section 2584 of the Code, means common, indiscriminate, illicit intercourse, and not merely seduction, or sexual intercourse, confined exclusively with one man. Ib.
- 8. Where on the trial of an indictment for enticing away an unmarried female, &c., there was testimony of a purpose on the part of defendant, "to seduce and enjoy the body of the said female, and that he had taken her away in order to have carnal intercourse with her, and did so enjoy her person, but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution; and where the defendant asked the court to instruct the jury as follows: "That if the defendant only intended to obtain the body of the said famale, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution in the sense of the law," which instruction the court refused to give; Held, That the instruction should have been given. Ib.

EQUITY.

- 1. Where a partnership is insolvent, or where its solvency is doubtful, a court of equity will restrain a sale of the partnership property under an execution against an individual member of the firm, until the settlement of the partnership affairs, in order to ascertain whether the debtorpartner has a real and valuable interest over and above the liabilities of the firm. Hubbard v. Curtis et al., 1.
- 2. In a bill in equity to restrain, by injunction, the sale of partnership property, under an execution against an individual member of the firm, it is not necessary to aver positively that the co-partnership is insolvent. It is sufficient, if from the allegations of the bill, and the facts stated, an alleged insolvency is apparent. Ib.
- 2. Nor is it any ground of objection to such a bill, that the complainant does not seek a stay of the sale, merely to ascertain the debtor's interest in the partnership, but asks a perpetual injunction. The court having cognizance of the case, to take an account of the partnership affairs, and finding it insolvent in fact, must necessarily make the injunction perpetual in the end, since, in such a case, there is no interest remaining in the debtor-partner to sell. *Ib*.
- 4. Where a temporary injunction, staying a sale of partnership property under an execution against an individual member of the firm, was dissolved, and thereupon the property was sold to one of the respondents; and where, on the final bearing of the cause, it was determined that the debtor-partner had no interest in the firm, it being found insolvent, and

it was decreed that the purchaser at the sale should restore to the receiver of the partnership, the property so purchased; *Held*, That there was no error in the proceeding. *Ib*.

- 5. Where it was objected to a bill in equity, to dissolve a partnership, and settle up its affairs, that no master in chancery had been appointed to take an account of the partnership debts; and where it appeared that the record of the cause was not complete, and the final decree implied that some order was taken to ascertain and settle the partnership debts, the appellate court refused to interfere with the decree. Ib.
- 6. Where a court of equity has made a final decree, dissolving a partnership, and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, proceedings may be taken, with proper notice to the respondents, to ascertain the joint debts of the firm. Ib.
- 7. A bill to restrain the sale of partnership property, under an execution against an individual member of the firm, and for a dissolution and settlement of the partnership, for the purpose of ascertaining the interest of the separate debtor in the firm, may be filed either by the debtor-partner, or the other partners—by the joint or the separate creditors—or by the purchaser himself, where the partnership property has been sold, prior to a settlement of the affairs of the partnership. 1b.
- 8. Where one of the questions at issue in a cause in equity, involves the character of proceedings in an action at law and the questions therein at issue decided, and the transcript of the proceedings in the action at law, is not made a part of the record, the appellate court can only ascertian what matters were put in issue and decided in the former suit, from the allegations of the pleadings in the chancery suit, not responded to, or expressly admitted by the other party. Lummery v. Braddy, 33.
- Where in a proceeding in equity, to restrain the respondents from flowing back the waters of the Nodaway river, by their mill dam, upon the land and mill site of the complainant, on the ground that certain proceedings under a writ of ad quod damnum, and the license granted to the respondents to build their dam, did not preclude the right of complainant to damages resulting to her from the acts of respondents, nor her right now to claim an injunction against them, to restrain them from flowing back the water of the river upon her mill-site, because she was no party to said proceedings, it appeared that one of the complainants, and the husband of the other, was made a party to the proceedings under the writ of ad quod damnum, and had due notice thereof; that upon the return of the inquisition, he was duly summoned to show cause why the said license should not be granted; that no objection being made, a license was granted to respondents to build their dam eight and a half feet high; that the land was in the possession of the husband at the time of the proceedings under the writ of ad quod damnum, claiming to hold it by right of pre-emption; that it was entered with his money and the title taken in the name of the wife, without her knowledge, during the progress of the said proceedings; and that it remained in the possession of the husband, after its purchase in the name of the wife; Held, That the complainants were bound by the proceedings under the writ of ad quod damnum, and the judgment of the district court rendered thereon, granting license to respondents to erect their mill dam. Ib.
- 10. Where under a bill to restrain the respondents from flowing water upon the lands of the complainant, by their mill dam, the district court ordered the respondents to remove their dam, and directed that in case

the same is not removed within thirty days, the sheriff remove the same; *Held*, That as there was no prayer in complainant's bill to that effect, the court erred in ordering a removal of the dam. *Ib*.

- 11. A trustee does not possess the right to continue to hold the trust interest in himself, unless it is so provided in the creation of the trust; and a conveyance of it to the cestui que trust, may be enforced by a court of equity. Stewart et al. v. Chadwick et al., 468.
- 12. A bill in equity to recover on a lost note, or other written instrument, is maintainable on the ground that complainant seeks to obtain a discovery from the respondent, as to the instrument lost or destroyed, and also relief consequent upon the discovery. Temple v. Gove et al., 511.
- 13. Such a bill is required to state, that without the desired discovery, the party has not sufficient evidence to maintain a suit at law, and should also state the loss or destruction of the instrument. *Ib*.
- 14. Where the instrument is not lost, or where the complainant has other sufficient evidence, to establish its contents, his proper remedy is at law. Ib.

ERROR.

- 1. Where in an action of trespass quare clausum fregit, the jury rendered a verdict against all of the defendants, among whom was one O—all of whom moved in arrest of judgment and for a new trial; and where on the hearing of the motion, the plaintiff asked the court to set aside the verdict as to said O., which was granted, and thereupon the court overruled the motion to set aside the verdict as to the other defendants; Held, That the proceeding was not erroneous. Terpenning v. Gallup et al., 74.
- 2. Where a party to an action before a justice of the peace, files his affidavit, and moves for a change of venue, on the ground that the justice is so prejudiced against him, that he cannot obtain justice before him, it is error to refuse a change of venue. Berner v. Frazier, 77.
- 8. In an action commenced by attachment, it is not error to strike from the files so much of the answer as takes issue upon the causes alleged in the petition for the writ of attachment. Burrows et al. v. Lehndorf, 96.
- 4. Where in a suit commenced before a justice of the peace, the original notice informed the defendant that the plaintiff claimed of him a certain sum, as money due her for the labor of her son, A., and that the amount claimed was justly due her as the balance of accounts for said labor of her son; Held, That the original notice sufficiently stated the plaintiff's cause of action, and that there was no error in permitting the plaintiff, in the absence of a bill of particulars, to give evidence under it, to show an indebtedness to her from defendant, for the work her son, A. Cain v. Devitt, 116.
- 5. A demurrer to the petition is waived by the answer; and the defendant, after answering, cannot assign for error in the appellate court, the judgment of the court overruling the demurrer. Cameron, Admx. v. Armstrong, 212.
- 6. Where a defendant, after his demurrer to the petition is overruled, files an answer with pleas of tender and set-off, and subsequently withdraws his plea of set-off, leaving his answer and plea of tender on file, he is not in a position to assign error on the overruling of the demurrer. 16.

- 7. Where a petition claims a sum certain from the defendant, with interest, it is not error to render judgment for a greater amount than the sum claimed. Ib.
- 8. In the appellate court the presumption is in favor of the correctness of the decision of the district court. If there was error in the ruling made, the party complaining should show it. Garvin v. Wells, 284.
- 9. It is error to set aside a petition for damages for failing to obey a subpœna, on motion or demurrer of the defendant, for the reason that no service of the subpœna had been made upon the defendant, which he was bound to obey. McCall v. Butterworth, 329.
- 10. The refusal of the court to give a defendant the opening and close of the case, on the ground that he has admitted the demand of the plaintiff, and set up new matter, is not a ground upon which to base an appeal, nor upon which error can be assigned. Goodpaster v. Voris et al., 384.
- 11. An action of trespass against two defendants, F. and T., commenced in Alamakee county. At the return term, F, filed a motion for a change of the venue of the cause, as regarding himself, to Clayton county, for the reason that he was a resident of that county, and averring in his motion, that he did not jointly with T., commit the trespass complained of; that whether guilty of committing the act singly and alone, he neither admits nor denies; and that T. was sued jointly with him, for the purpose of compelling him to come to trial in Alamakee county, and not because the said T. was guilty. The plaintiff demurred to the motion. The court overruled the demurrer, and informed the plaintiff that he could take issue on the facts stated in the motion, and ordered a jury to be impannelled to try T. on the issue so presented, which should determine the question of jurisdiction over F. The plaintiff declined to go to the jury on the grounds suggested by the court—whereupon the court discharged T., and ordered a change of venue as to F., and awarded him thirty dollars for his expenses; Held, That the proceeding was erroneous. Lyon v. Frazier, 349.
- 12. Where it is assigned as error, that the court would not permit a party to amend his affidavit for a writ of attachment, or that the order quashing the writ was made unconditionally, the record should show that the party asked leave to amend, and that such leave was refused by the court; and unless these facts appear from the record, it is not shown affirmatively that there was error. Pitman & Bro. v. Seareey, 352.
- 13. Where it is assigned for error that improper evidence was admitted, and it appears from the record that the evidence complained of was admitted, in connection with other testimony, which is not set out in the record, the appellate court cannot determine whether or not there was error. Platt & Co. v. Hedge, 386.
- 14. Where on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and tokens by which horse-thieves are known and recognized by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens. The State v. Wilson, 407.
- 15. Where the nature of the case will admit of it, an assignment of error should be so explicit. as to direct the attention of the court to the particular ortion of the instructions, or other proceeding in the court below, to which objection is made. The State v. Sater, 402.

- 16. The appellate court will not wade through a mass of instructions, to hunt up errors in the record, not plainly pointed out, and but vaguely intimated by the assignment of the party. *Ib*.
- 17. Where it is assigned for error, as follows: "The court erred in giving the instructions asked by the prosecution, and in refusing the instructions asked by defendant," the assignment will be disregarded. Ib.
- 18. The refusal of the court to strike from an answer in chancery, the affidavit of respondent, or to strike from such an answer redundant matter, is not a subject upon which to assign error. Bucl v. Lake, 551.

EVIDENCE.

- 1. Infants are as much bound by the conduct of those who conduct their case as adults, provided their conduct be bona fide; and where the solicitor of an infant, consents to take the evidence in a proceeding in chancery by affidavit, instead of depositions upon interrogatories, the infant will be bound thereby. Ralston v. Lahee, 17.
- 2. Whenever the law provides for the admission of books of account in evidence, it is based upon the idea of the presence of the books themselves upon the trial; and in their absence evidence of their contents cannot be substituted. Churchill et al. v. Fulliam, 45.
- 8. The book itself, when admited, becomes the witness, and is still subject to any objections which may be made by the opposite party, respecting its credibility, arising from the manner in which it is kept—its appearance, alterations, erasures, confusion and irregularity—and whatever may tend to diminish its credibility in the eyes of a jury. Ib.
- 4. A party is not called upon to dispute an account, on every occasion on which it may be presented; and when evidence of any act or declaration of a party is given, as tending to prove the account, care should be exercised in determining whether the circumstances required the defendant to dispute the account, so as to cause his omission to do so to have weight against him. Ib.
- 5. A written agreement may be varied by evidence of a subsequent parol agreement, additional and suppletory to the eriginal contract, and upon a new consideration. Willey v. Hall, 62.
- 6. So, it may also be shown by parol evidence, that the parties to a written contract, by a parol contract subsequent to the written one, abandoned the latter, except so far as applicable to the new parol agreement. B.
- 7. Evidence cannot be given of matter arising after the commencement of the action, whether it occurred before or after plea pleaded, unless the foundation has been laid by the proper pleadings. Allen v. Newberry, 65.
- 8. Where in an action on a promissoey note, given in part payment for a reaper, in which the defendant claimed a set-off, on the ground of a breach of the warranty under which the reaper was sold, a witness for the defendant, on cross-examination, testified that after the reaper was delivered, defendant told him he was going over the river to Rock Island, to get some castings for the reaper, and thereupon the defendant proposed

to prove by the witness, what he told him subsequently, and in another conversation, about the working of the reaper, with the castings thus obtained, which evidence was admitted; *Held*, That the evidence was not admissible under section 2399 of the Code. Williams v. Donaldson, 108.

- 9. Parol evidence is admissible to show that a written contract is void for fraud, or the like, or that it never had any legal existence or binding force; and such evidence does not infringe upon the rule, that parol evidence is not admissible to contradict, vary, or add to, a written instrument. Ib.
- Where on the trial of an indictment for perjury, in which the defendant was charged with falsely and corruptly swearing substantially as follows: "That he saw S. give the sum of ten dollars to one E. some time in the latter part of December, 1856, which said S. requested him to pay to one C., and that he saw said E. pay the money to C. a few days thereafter, in Baltimore township, in Henry county," the said E. was called as a witness, and testified that he did not pay the money to said C. "at the said time, between the 25th of December and the 1st of January, but was away out of the county of Henry from Christmas to New Years, or the night previous," and thereupon the defendant offered to prove by one J., that he saw said E. in the vicinity of Boyles' mill, in said county, between Christmas and New Years; and to show, by said witness, circumstances which tended very strongly to impress the fact on his memory, and also fixed the time, which evidence was rejected by the court; Held, That the evidence was admissible, under the circumstances. The State v. Seaton, 138.
- 11. Where in an action of replevin to recover the possession of a mare, clamed to be exempt from execution, after the plaintiff had offered evidence of his residence in this state, the defendant offered to prove that the mare was sold by L. & L., of Chicago, Illinois, to N. & Co., of which firm plaintiff was a member; that plaintiff then resided in Illinois; that in consideration of the sale of said mare, N. & Co. made their note to L. & L., which note was executed and payable in Illinois; that by the law of that state, the mare was not exempt from execution; that soon after the making of the note, the plaintiff, without the knowledge of L. & L., absconded from said state with said property, and came to Dubuque, in lowa, where he was pursued by L. & L., who, to collect said note, sued out a writ of attachment against N. & Co.; and that, under the said writ, the mare was attached, which evidence was rejected; Held, 1. The pleadings did not present the issue of fraud; 2. That the evidence was properly rejected. Nevell v. Hayden, 140.
- 12. Where in an action to recover a balance due on a contract for building a school-house, a copy of which contract was attached to the petition, and was signed by the secretary of the district, the averments of which petition were denied by the answer, the plaintiff first offered in evidence the instrument of writing attached to the petition, which was objected to, and excluded by the court; and where the plaintiff then called witnesses, and proposed to prove that he had called upon the directors of the school district for the contract, or a copy thereof, to work by in building the school-house, and that the directors delivered to him the instrument, and told him to work by the same, in building the house; and where the plaintiff proposed to offer the said instrument in evidence, as the contract between the parties, all of which evidence was excluded by the court; Held, That the court erred in excluding the evidence. Pierce v. School District No. Two, &c., 277.
- 13. Where in an action on a promissory note, as follows: \$181 86. Twelve months after date, we, or either of us promise to pay S. & B., or

Vol. VIII.—77

order, one hundred and eighty-one dollars and eighty-six cents, for value received, to draw ten per cent. interest from date, if not punctually paid. February 10, 1857," in which the defendant pleaded usury, the plaintiff called one of the defendants as a witness, who testified that in February, 1857, he executed a note to plaintiffs—he thought about the first of February, but would say about the 4th, 5th, 6th, 7th or 8th-for the sum of \$180 and some cents, or for \$181 and some cents—he thaught it was eighty cents; that one M. signed the same as surety; that it was given for \$100, and a note of his own for \$29 80; that the words did not contain any words relation to prompt payment-did not draw ten per cent. interest-nor was there a promise to pay interest; that if there was, he thought he should remember it; that he owed no other note to S. & B.; and that the note was payable in one yearfrom date; and where the court held that the evidence failed to establish the identity of the note, and rendered judgment for the plaintiff for the amount of the note sued on; Held, That the note was sufficiently identified, and that the finding of the court was erroneous. Snell v. Kimmell, 281.

- 14. A party cannot be made liable for money paid to his use, unless his request to pay the money, is proved by other evidence than that furnished by the books of the plaintiff. Snell v. Eckerson, 284.
- 15. Where in an action to recover for goods, wares and merchandise, sold to defendant, and for money paid for him to the firm of H. & Co., the plaintiff offered in evidence his book of original entries, to show the payment to H. & Co., which book contained an item as follows: "May 17, 1857. To amount paid H. & Co., \$45 35;" and then offered the books of H. & Co., without any proof of authority by defendant to plaintiff to pay the same; and where the defendant objected to the admission of the books of H. & Co., without first showing some authority to plaintiff to pay the same, or an assignment of the account, in some other manner than the charge on the plaintiff's books, which objection was overruled, and the evidence admitted; Held, That the court erred in admitting the evidence. 16.
- 16. After proof of the loss of a record, its contents may be proved, like any other documents, by secondary evidence. Higgins v. Reed et al. 298.
- 17. Where the original record is lost, and a copy can be produced, the copy is better than parol evidence of its contents, and its production should be required; but if the existence of better evidence is not disclosed, then the contents may be proved by parol. *Ib*.
- 18. In an action of trespass against the officers of a school district, for the taking and sale of personal property, in payment of a school-house tax, the defendants may offer in evidence a bond for the delivery of the property, executed by the plaintiff. *Ib*.
- 19. Where in an action for work and labor, &c., the defendant pleaded, first, a denial of the cause of action, and, secondly, payment; and where on the trial, the defendant offered to prove, "that the money sued for, so far as the plaintiff has any claim, was not due at the commencement of suit, which being objected to, was rejected by the court, upon the ground that the defendant "offered to prove this fact by a special contract;" Held, That the defendant should have pleaded the contract specially, and that the evidence was properly excluded. Hogan v. Burch, 309.
- 20. Where in an action on an attachment bond, the plaintiff alleged that he offered to give the defendant, as attaching creditor, security from his property, and among other things, offered to assign to him his books of account; and where on the trial, in order to show what amount was due

on his books, and that the persons against whom the accounts stood were responsible, he called a witness, who testified that the demands on the books amounted to about \$700 00, and that the debtors therein were responsible men, but that he could not then recollect their names, nor the amounts due from them respectively, and could give the names of but three persons—to which evidence the defendant objected, for the reason that the books should be produced; Held, That the evidence was competent, with, or without, the books. Drummond v. Stewart, 341.

- 21. In an action on an attachment bond, the writ of attachment and the officer's return thereon, is admissible in evidence. Ib.
- 22. Where in an action to recover damages for the talse and fraudulent representations of the defendant, as to the quality and description of certain lands, sold and conveyed by the defendant to the plaintiff, the petition alleged that the plaintiff, being the owner of certain lands in C. county, the defendant proposed to purchase the same, and to give in exchange therefor, certain lands in R. county, representing said lands to be of a certain quality as to timber, &c., and that plaintiff, relying upon said representations, sold, &c..—all of which allegations were denied by the answer; and where on the trial, the defendant called a witness, and proposed to prove the value of the land conveyed to him by the plaintiff, and the improvements upon it, which was objected to, and the objection sustained by the court Held, That the evidence was immaterial, and properly excluded from the jury. (Waight, C. J., discenting.) Likes v. Baer, 868.
- 23. Where in an action for damages for fraudulent representations in the sale of real estate, the defendant asked the court to instruct the jury as follows: "Hearray evidence, or what may be said by parties, which may be given in evidence by witnesses, is, or may be, according to the circumstances, the weakest kind of testimony," which instruction the court refused to give; Held, That the effect of the instruction, if given as asked, would have been to attach the character of hearapy to the evidence given by the witnesses, as to what was said by the parties, at the time the agreement was made, as to the quality and character of the defendant's land, and that it was properly refused. Ib.
- 24. Where it is assigned for error that improper evidence was admitted, and it appears from the record that the evidence complained of was admitted, in connection with other testimony, which is not set out in the record, the appellate court cannot determine whether or not there was error. Platt & Co. v. Hedge, 386.
- 25. Instruments of writing, conveying property to creditors, to secure the payment of money advanced, are but assignments to creditors; and where they do not definitely specify the sum due, parol evidence is admissible to show the true amount of the debts. *Ib*.
- 26. Where a party moves to rule out testimony, the ground of objection to the evidence should be distinctly stated; and the fact that it was not stated, is a sufficient reason for overruling the motion. The State v. Wilson, 407.
- 27. Where a party, residing in one place, purchases goods of another, residing at a different place, though an agent at the place where the contract is made, which goods are the property of the vendor, and ready for delivery, to be forwarded by express, and paid for with a secured note, payable in six months, the contract, under section 2409 of the Code, (Statute of Frauds), to be valid, must be evidenced by writing. Partridge v. Wilsey, 459.

- 28. Where a tract of land is described in different modes by different instruments, parol evidence is admissible to show that the different descriptions embrace the same tract of land. Stewart et al. v. Chadwick et al., 463
- 29. Extrinsic evidence may properly be resorted to, in order to show the usage of a business, or the use and nature of certain kinds of property, viewed with reference to its application, or the interest to which it may be subservient. Ib.
- 30. Evidence to impeach a witness is not admissible, where the party has laid no foundation for the impeachment, in his examination of the witness. Ib.
- 31. The knowledge of the interests of an estate, which an administrator obtains in the discharge of his duties, is competent to establish the fact that there was such a claim, or such a demand, belonging to or set up by the estate, though it may not be sufficient to fix its original truth or validity, and is not hearsay evidence. *Ib*.
- Where in an action of trespass, for taking certain goods, wares and merchandise, the defendants answered, denying the trespass, and the plaintiff offered evidence to show that the goods were taken by the sheriff, under an attachment is sued in a suit wherein B. B. were plaintiffs, and M. B. were defendants, which writ, with the return of the officer thereon, was also offered in evidence; and that the defendants executed to the sheriff a bond of indemnity to induce him to attach the goods; and where the defendants then offered in evidence the original papers in the suit of B. B. v. M. B., including the notice, petition, affidavit for attachment, and notes and accounts sued on, in which suit a judgment by default had been claimed, to which the plaintiff objected, but the objection was overruled, and the eridence admitted; and where the plaintiff asked the court to instruct the jury as follows: "That the notes, accounts and, papers, in the suit of B. B. v M. B, not being proved, are not evidence in this suit, of any indebtedness between the parties thereto;" which instruction the court refused to give: Held, 1. That the papers offered in evidence by the defendants were prima facie evidence of an indebtedness existing from M. B. to B. B., and so far as that fact was relevant, were proper to be given in evidence: 2. That the instruction asked was irrelevant, and properly refused. Edinger v. Henchler et al , 513.

EXEMPTION.

- 1. Where property is replevied from an officer, on the ground that it was exempt from execution; and it is sought to show that the plaintiff is a non-resident of the state, and not entitled to the exemption, such defence should be set up by the defendant, rather than rebutted in the first instance, by the plaintiff. Newell v. Hayden, 140.
- 2. The exemption of property from execution, relates to the remedy, and is governed by the law of the place where the contract is sought to be enforced, instead of the lex loci contractus. Ib.

FIXTURES.

1. The word "fixtures" and "appurtenances" have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context, and to the connection in which the words are used. Pickerell v. Carson, 544.

- 2. Replevin. On the 30th of October, 1856, F. M. P., one of the plaintiffs, being indebted to the defendant, in the sum of \$2,500, by an instrument of writing of that date, and to secure the payment of said sum, did "sell and convey unto the said defendant, the following described premises, to-wit: all the fixtures and appurtenances contained in the daguerrean rooms on Main street, Dubuque, belonging to the said F. M. P. No schedule of the property was attached to the conveyance. On the 12th of January, 1857, F. M. P. sold and conveyed by bill of sale, to O. F. P., the other plaintiff, for the alleged consideration of \$2,000, all the daguerreotype material, stock, cameras, picture frames, paintings, furniture, one piano forte, carpet on floor, improvements and looking glass, together with the lease on the gallery, and all and singular every article in any wise appertaining to the business contained in the National Daguerreotype Gallery in Dubuque, Iowa; Held, 1. That the word appurtenances in the bill of sale to defendant, embraced the loose moveable articles of personal property, in the daguerrean rooms, so far as they were necessary to the business carried on therein; 2. That under the term "fixtures," all the right and interest of F. M. P. in and to the sky-light, balcony, partition, and all other property annexed to the premises, rassed to the defendant under the said bill of sale. Ib.
- 3. Fixtures are personal chattels annexed to the freehold, and which may be severed and removed by the party who has annexed them, against the will of the owner of the freehold. Ib.

FORECLOSURE.

- 1. Where a vendor of real estate, to which he retains the legal title, and for which he has executed a bond for a deed, assigns a promissory note, received in consideration of the sale of said land, and agrees that the assignee shall be substituted to the benefit of all security held by him, the assignee of the note, upon its non-payment, is entitled to the same rights as the vendor himself: and he may file a bill in his own name against the vendee, and all persons claiming under him, with notice, for a fore-closure and sale of the premises. Biair & Co. v. Marsh et al., 144.
- 2. In such a case, the vendee is to be regarded as a mortgagor; and he and those claiming under him, with notice, cannot raise the objection that the complainant is a mere assignee, and that the relation of vendor and vendee does not exist between them. Ib.
- 3. Bill of foreclosure, alleging that in May, 1857, the defendant, L., sold to his co-defendant, M., certain lots in the town of Mount Pleasant, at the price of \$3,000; that one half of the purchase money was paid, and for the remainder M. executed his two promissory notes for \$750 each, payable January 1, and March 1, 1858; that it was agreed that L. should retain the title of the lots until the notes were paid, and give to M. a title bond for a conveyance, on the payment of the balance of the purchase money; that on the payment of the \$1500, and the execution of the notes, M. was put in possession of the lots; that M., being indebted to B. O. & Co., for money borrowed, as collateral security for the payment of the same, assigned to them the title bond of L.; that before the second note became due, the complainant purchased and took an assignment of the same from L., without recourse, and looking solely to said lots as the security for the payment of the same; that it was then agreed between them, that the complainant should succeed to the benefit of all the security held by L., for the payment of the same; that the note is due and unpaid; and that M. is wholly insolvent. The bill makes L., M. and B. U. & Co., parties, and prays that M. may be compelled to perform his agreement with L.; that in default thereof, all the interest of M. and B. O. &

Co., in the lots, may be foreclosed, and sold to satisfy his claim; and that on the payment of the same, L. may be required to convey the lots to the purchaser. Demorrer to the bill by M. and B. O. & Co., for the reason that complainant was a mere assignee of L., and that the relation of vendor and vendee did not exist between complainant and themselves, which was sustained; *Held*, 1. That the right of L. to foreclose against M. for the non-payment of the note, was a quality incident to the debt, which passed by the assignment of the note, and the agreement between L. and the complainant; 2. That the complainant possessed the rights of L., and could foreclose in the same manner, in his own name; and, 3. That the court erred in sustaining the demurrer. *Ib*.

- 4. Where in a proceeding to foreclose a mortgage, under chapter 118 of the Code, judgment was entered for the amount found to be due the plaintiff, ordering a foreclosure, and awarding a special execution against the property; *Held*, That the judgment did not cut off the right of the dendant to redeem before the sale, under the special execution, and followed substantially the provisions of the Code. *Duncan v. Hobart et al.*, 337.
- 5. In a proceeding to foreclose a mortgage, where the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition is due and owing, there is nothing for the plaintiff to prove. Cooley v. Hobart et al., 258.
- 6. The fact that a mortgage was executed to secure the payment of a debt previously contracted, will not invalidate it; nor does it make any difference that it was executed by one of the members of a partnership and his wife, to secure the debts of the firm. Ib.
- 7. Where a petition to foreclose a mortgage, asks a judgment on the note, and a foreclosure of the mortgage, there is no union of law and equity in one proceeding; and the judgment prayed for is authorized by section 2084 of the Code. *Ib*.
- 8. Where it is sought to enjoin the foreclosure of a mortgage, without proceeding by civil action in the district court, on the ground that the mortgage was executed to secure the payment of the purchase money of the said premises—that the covenants of the deed were broken—and that the vendor had no title to the land—the bill, in order to sustain an injunction, should allege either fraud or mistake, or show that the complainant would sustain irreparable injury, by being turned over to his legal remedy upon the covenants in the deed. Crocker v. Robertson, 404.
- 9. It is no ground for an injunction, to restrain the foreclosure of a mortgage without action, that the mortgage was executed to secure the unpaid purchase money of the premises, and that the mortgagee, when he conveyed the premises to the mortgagor, had no title to the land. *Ib*.
- 10. A mortgagor of real estate, cannot enjon the foreclosure of a mortgage, executed to secure the unpaid purchase money of the premises, on account of defects in the title with which he is cognizant when he received the deed. Ib.

FORGERY.

1. Where a party is charged with forging an indorsement on the back of an order or draft purporting to have been drawn by one bank upon another, proof of the existence of the bank is not required; nor is it necessary to aver the genuineness or validity of the instrument forged. The State v. Pierce, 231.

- 2. The language spirit, scope and tenor of section 2643 of the Code, shows that it extends to cases for falsely making and uttering indorsements on any note, bill, order, or instrument, as well as to falsely making and uttering the body of the instrument itself. *Ib*.
- 3. The essence of the crime of forgery consists in doing the act with the intention to defraud. Ib.
- 4. Where a writing is invalid on its face, it cannot be the subject of forgery, for the reason that it has no legal tendency to effect a fraud; but where the invalidity is to be made out by proof of some extrincic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished. Ib.
- 5. In order to constitute the crime of forgery, it is not necessary that any person should have been defrauded in fact. The attempt to defraud, and the intention to do so is sufficient. Ib.

FRAUD.

- 1. Where in an action of replevin to recover the possession of a mare, claimed to be exempt from execution, after the plaintiff had offered evidence of his residence in this state, the detendant offered to prove that the mare was sold by L. & L., of Chicago, Illinois, to N. & Co., of which firm plaintiff was a member; that plaintiff then resided in Illinois; that in consideration of the sale of said mare, N. & Co. made their note to L. & L., which note was executed and payable in Illinois; that by the law of that state the mare was not exempt from execution; that soon after the making of the note, the plaintiff, without the knowledge of L. & L., absconded from said state with said property, and came to Dubuque, in Iowa, where he was pursued by L. & L., who, to collect said note, sued out a writ of attachment against N. & Co.; and that, under the said writ, the mare was attached; which evidence was rejected; Held, 1. The pleadings did not present the issue of fraud; 2. That the evidence was properly rejected. Newell v. Hayden, 140.
- 2. Where in an action to recover damages for the false and fraudulent representations of the defendant, as to the quality and description of certain lands, sold and conveyed by the defendant to the plaintiff, the petition alleged that the plaintiff, being the owner of certain lands in C. county, the defendant proposed to purchase the same, and to give in exchange therefor, certain lands in R. county, representing said lands to be of a certain quality as to timber, &c., and that plaintiff, relying upon said representations, sold, &c.—all of which allegations were denied by the answer; and where on the trial, the defendant called a witness, and proposed to prove the value of the land conveyed to him by the plaintiff, and the improvements upon it, which was objected to, and the objection sustained by the court: Held, That the evidence was immaterial, and properly excluded from the jury. (Wright, C. J., dissenting.). Likes v. Baer, 368.

GAMBLING HOUSE.

- 1. Under section 2721 of the Code, which prohibits the keeping of gambling houses, the offense is as complete, if the house is kept for that purpose for one day, as if kept for a year. The State v. Crogan, 523.
- 2. To show that the place charged is kept as a gambling house, within the meaning of section 2721 of the Code, it may be shown that it was thus used continuously, but it is not necessary to charge such use in the indictment. 1b.



3. In an indictment for keeping a gambling house, it is not necessary to state the location of the house kept, further than to show the proper venue; but where the indictment alleges that the building is situate on a particular lot, the proof must sustain the allegation. Ib.

GARNISHEE.

- 1. Without a writ of attachment, a sheriff has no authority to notify a party that he is attached as garnishee, nor to take his answers to the interrogatories specified in section 1865 of the Code. Vanfossen v. Anderson, Garnishee, 251.
- 2. Nor has the district court power to render judgment upon a notice of garnishment thus given, and answers thus taken and returned. Ib.

GENERAL ASSEMBLY.

- 1. Where the business of the general assembly, at a special session convened by the governor, is not restricted by some constitutional provision, it may enact any law at such special session, that it might at a regular session. The powers of the general assembly not being derived from the governor's proclamation, it is not confined to the special purposes for which it may have been convened by him. Morford v. Unger, 82.
- 2. The general assembly may provide, that the authority of a city shall not be extended over new territory, but upon the expressed consent of the people of the city. *Ib*.
- 3. The right of the general assembly to create corporations for municipal purposes, conferred by the constitution of 1846, is not made to depend upon the consent of the inhabitants, or proprietors of the land, on which the proposed city or town is situate. Ib.
- 4. So, the power of imposing a local government upon a town or city, includes the power of ascertaining the extent of the corporation and its just boundaries, as well as the powers to be vested in the local government; and among the powers deemed essential to the objects of the corporation, is that of levying such reasonable taxes upon the property within its limits as may be necessary for such local purposes as the corporation is authorized to accomplish. Ib.

GRANTOR AND GRANTEE.

1. A grantor of real estate, who conveys by deed of general warranty, is a competent witness for the complainant, in an action against his grantee, to show that the grantor conveyed, by mistake, a greater interest in the land than he possessed, and to enforce the trust against the grantee. In such a case, he is called upon to testify against his interest. Stewart et al. v. Chadwick et al., 463.

GUARDIAN AD LITEM.

1. A guardian ad litem may be appointed, either on the motion of the plaintiff, or the defendant in an action, but the court will not permit an adverse party to select the guardian for the infant. Ralston v. Lakee, 17.

HEIR.

1. A contract of an administrator relating to the estate of the decedent, such as he had authority to make, will enure to the benefit of the

heirs, after it shall be ascertained that it is not required to pay the creditors of the estate. Stewart et al. v. Chadwick et al., 463.

- 2. A contract concerning an interest in a claim, must be treated as personalty, and pertains to the administrator of the estate; and the right or interest will descend to the heirs of the decedent. Ib.
- 3. Where minor heirs are parties to a petition in chancery, it is not necessary that the petition should show the ages of such minor heirs. 1b.
- 4. The omission of an administrator to inventory a claim, or other interest of the decedent, will not operate to forfeit the right of the heirs to any portion of the estate; nor need the heirs obtain authority from the probate court, to prosecute for the recovery of an interest in the estate, which they may regard themselves as entitled to. Ib.
- 5. Where W. and C. each claimed a "claim" right in mineral land, and C., and the administrator of W., entered into an agreement, by which the said C. agreed to give to the said W's estate one-sixth part of all mineral raised upon the land; that he would enter the land from the United States, and was to receive the surface, or soil of said property; that if he worked the ground, he would pay to said estate one-sixth of the mineral; and that if the estate worked or discovered any mineral, it was to have the privilege to do so, without paying any part to any person; Held, 1. That C. was to hold the soil, or surface—the agricultural use of the land—and that the estate or heirs of W. held the mineral right; 2. That C., when he caused the land to be entered, held the mineral right in trust for the heirs of W. 1b.
- 6. A widow has no estate, as such, in an interest in real estate held in trust by another, for her husband. Upon the death of the husband, the right descends to his heirs at law, and when they have recovered the estate, she makes her claim of dower against them. Ib.

HUSBAND AND WIFE.

- 1. Where a husband introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, the wife will be justified in withdrawing from his protection, and he will be bound to provide her with necessaries. Descelles v. Kadmus, 51.
- 2. The husband is required to supply the wife with necessaries, such as meat, drink clothes, medicine, &c., suitable to his degree and circumstances; and if he, by his treatment, shall render her situation unsafe, or their home unfit for a modest and chaste woman to remain in, he sends her from home as effectually as if he turned her out of doors without cause; and, under such circumstances, he gives her a general credit for necessaries, for which he will be liable to any one furnishing them. Ib.
- 3. In order to enable a plaintiff to recover for necessaries furnished the inrane wife of the defendant, when compelled to leave his house, on account of either his cruel treatment, or because of his making lewd and profligate women inmates of her home, it is not necessary that the plaintiff should show that he furnished such necessaries as the regularly appointed guardian of the wife. Ib.
- 4. The testimony of a wife, when called as a witness on the part of her husband, in a criminal case, is not to be marked and distinguished from that of other witnesses; she is entitled to be regarded as others are, and to stand free and unembarrassed upon her own character. The State v. Rankin, 355.

Vol. VIII.-78

- 5. Where in a criminal case, in which the wife was called as a witness, and testified on the part of her husband, the court instructed the jury as follows: "The law permits the wife to testify for her husband in a criminal cause, but her peculiar relation to her husband renders it incumbent on the jury to examine her testimony with peculiar care and caution, and if, from the whole testimony, they are satisfied that what she said is true, they should give her testimony the credit of any other witness. But if, from her testimony, taken together with that of other credible witnesses, the jury are satisfied that what she said was false, they should rejectit altogether; Held, That the instruction was erroneous. Ib.
- 6. A widow has no estate, as such, in an interest inreal estate, held in trast by another for her husband. Upon the death of the husband, the right descends to his heirs at law, and when they have recovered the estate, she makes her claim of dower against them. Stewart et al. v. Chadwick et al., 463.

INDICTMENT.

- 1. An indictment which distinctly charges an assault and battery only, is good, although it charges the act as being done riotously, and in a violent and tumultuous manner; and such an indictment does not charge an unlawful assembly and riot; nor does it unite two distinct offenses. The State v. McClintock, 203.
- 2. It is not a valid objection to the admission of a witness in a criminal case, on the part of the state, that his name is not indorsed on the indictment. Ib.
- 8. Neither the present nor the past statutes of this state dispense with the leading requisites of indictments. The State v. Callendine, 288.
- 4. It is only an inconsistency in the material allegations that will vitiate an indictment; and where the defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage, and disregarded. The State v. Freeman, 428.
- 5. The appellate court will not presume that the district court undertook to try a defendant, indicted for a criminal offense, without the indictment. The State v. Shelledy, 477.
- 6. In a criminal case, where there is a general verdict of guilty, on an indictment containing several counts, if any one of them is good, the judgment will be supported. Ib.
- 7. Where the place is stated in an indictment, as a matter of local description, and not as venue, it is necessary to prove it as laid. The State v. Crogan, 523.

INFANTS.

- 1. An infant defendant is as much bound by a decree in equity against her, as a person of full age; and, consequently, if there be an absolute decree against a defendant who is under age, he or she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it—as fraud, collusion, or error. Ralston v. Lahee, 17.
- 2. To impeach a decree in equity, against an infant, on the ground of fraud or collusion, the infant may proceed either by bill of review, or by original bill. To impeach it on the ground of error, the infant may proceed by original bill, and he is not obliged to wait, for that purpose, until he has arrived at the age of twenty-one years. Ib.

- 3. In ordinary cases, where an infant is allowed time, after her arrival at the age of twenty-one years, to show cause against a decree, the decree in such cases is deemed complete, but the infant has the time allowed to show cause against it. If no cause is shown, within the time specified, the infant is bound. Ib.
- 4. After the infant comes of age, and before the decree is made absolute, she may, as a matter of course, on motion, obtain leave to amend the answer filed by her guardian, or to put in a new one. By the new, or amended answer, she may make a better defense, and support that defense by new evidence; and for that purpose, may file a bill of discovery. 16.
- 5. An infant defendant, wishing to make a new defense to a decree in equity, must apply to the court as early as possible, after obtaining the age of twenty-one years; for if she is guilty of any laches, her application will be refused. Ib.
- 6. An infant defendant may either impeach a decree in equity, on the ground of fraud or collusion between the complainant and her guardian, or she may show error in the decree. She may also show that she had grounds of defense, which were not before the court, or were not insisted on at the hearing; or that new matter has subsequently arisen, upon which the decree may be shown to be wrong. Ib.
- 7. Where an erroneous decree has been obtained against an infant, and the error is not in the judgment of the court, but in the facts on which the judgment is founded—as where there has been fraud or collusion between the complainant and the guardian ad litem, or where there has been any deception, or any surprise, upon the court, the infant may, either during infancy or afterwards, investigate the decree by a bill of review, or by original bill; and this, although the ground of complaint against the decree, is confined to error. Ib.
- 8. In such cases, the proceeding on which the decree is founded, is treated as fraudulent—it being considered fraudulent to take advantage of the incompetency of the infant to defend herself. Ib.
- 9. An infant is not bound by admissions made in his or her behalf, unless such admissions are for the benefit of the infant. 1b.
- 10. Where there is an infant defendant, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of adults, must be proved against the infant. 1b.
- 11. There can be no valid decree against an infant, by default, nor on the answer of a guardian. *Ib*.
- 12. But where in a proceeding to reach the equitable interest of a judgment debtor in real estate, against the debtor and his infant daughter, in whose name the title had been taken, the guardian ad litem of the infant, in his answer, admitted the judgment against the father—that execution issued thereon, had been returned "no property found"—that the father had no property out of which the judgment could be satisfied—that the said infant was the daughter of the said judgment debtor—and that the title to one of the lots in controversy, was in the said infant—and denied the other allegations of the bill; Held, That as the substantial matters admitted in the answer of the guardian, were matters of record, the court could not presume that the decree was rendered on the admissions of the guardian; and that those admissions did not prejudice the rights of the infant. Ib.

- 13. A guardian ad litem may be appointed, either on the motion of the plaintiff, or the defendant, in an action, but the court will not permit an adverse party to select the guardian for the infant. Ib.
- 14. The fact that a guardian ad litem, at the time of his appointment, and at the date of the decree, was interested against the infant in the subject matter of the controversy, is not such conclusive evidence of fraud as to authorize the setting aside of the decree, for that reason alone, unless it is shown further, that the guardian made use of his position, to work some injury to the interest of the infant. Ib.
- 15. Infants are as much bound by the conduct of those who conduct their case as adults, provided their conduct be bona fide; and where the solicitor of an infant, consents to take the evidence in a proceeding in chancery by affidavit, instead of depositions upon interrogatories, the infant will be bound thereby. Ib.
- 16. Where a decree has been rendered against an infant, and she afterwards succeeds in showing, that it ought not to have been rendered, the court will place her, as far as practicable, in the situation in which she was before the decree was made. Ib.
- 17. It is entirely competent for a court to discharge the "next friend" of a minor, in whose name an action has been commenced, on his motion, and substitute another to carry on the suit. Thurston v. Cavenor, 155.

INJUNCTION.

- 1. Where a complainant in chancery alleges that he is a citizen and resident of the county, and, as such, interested in the public welfure, he shows such an interest as entitles him to present a petition for, and obtain an injunction to, restrain a public officer from the commission of an act which would be a public wrong. Collins v. Ripley, Co. Judge, 129.
- 2. The fact that a bond for an injunction to restrain a county officer from committing a public wrong, is executed to the county judge in his official capacity, instead of the county itself, affords no ground for dissolving the injunction. *Ib*.

INSTRUCTION.

- 1. A party cannot complain of an instruction which, even if errone-out, worked him no prejudice. Armstrong v. Pierson, 29.
- 2. Where in an action to recover for work done and performed, it appeared that the plaintiff was hired by the defendant, to labor for him for the term of six months, and that he left the service of the defendant at the expiration of four months, and thereupon the court was asked to instruct the jury as follows: "1. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he has no claim upon the defendant for the services rendered; 2. If the plaintiff hired to the defendant, without cause, before the expiration of the time, he cannot recover anything for his services, although the defendant had paid plaintiff a part of his wages, during the continuance of the service"—which instructions the court refused to give; Held, That the instructions were properly refused. Pixler v. Nichols, 106.
- 3. Where in an action by a widow, to recover for the services of her minor son, the defendant asked the court to instruct the jury as follows:

- "That the mother, on the death of the father, is not entitled to recover for the earnings of her minor child, and cannot maintain an action therefor in her own name," which instruction the court refused to give; *Held*, That the instruction was properly refused. Cain v. Devit, 116.
- 4. Where there is nothing in the testimony in a cause, to justify the assumption on which instructions asked are predicated, they may be properly refused. *Ib*.
- 5. There is no error in refusing to give an instruction asked for, however correct or applicable it may be, when the same instruction substantially, has been previously given by the court. Moffitt v. Cressler, 122.
- 6. To give an instruction upon a state of facts not proven, is calculated to mislead and confuse the jury, and is error. 1b.
- 7. An instruction to a jury, upon a mere abstract proposition of law referring in no way to either the evidence or issues made, and which has not misled the jury, to the prejudice of the party complaining, will not warrant the granting of a new trial; but where the instruction has a tendency to make an erroneous impression upon the jury, and mislead them in their views of the case, a new trial should be granted. Ib.
- 8. The correctness of instructions, in most, if not in all cases, depends upon the facts or circumstances developed upon the trial; and where their applicability or irrelevancy is not shown, by a bill of exceptions, embodying sufficient of the testimony, the appellate court cannot determine upon their correctness, nor determine whether the court erred in granting a new trial, on the ground that they were erroneous. Farr v. Fuller, 347.
- 9. Where in an action for damages for fraudulent representations in the sale of real estate, the defendant asked the court to instruct the jury as follows: "Hearsay evidence, or what may be said by parties, which may be given in evidence by witnesses, is, or may be, according to the circumstances, the weakest kind of testimony," which instruction the ccurt refused to give; Held, That the effect of the instruction, if given as asked, would have been to attach the character of hearsay to the evidence given by the witnesses, as to what was said by the parties, at the time the agreement was made, as to the quality and character of the defendant's land, and that it was properly refused. Likes v. Baer, 368.
- 10. Where in an action for dumages for fraudulent representations in the sale of real estate, the defendant asked the court to instruct the jury as follows: "That if the only testimony before them, in relation to the quality of the land, is such representations as may be detailed to you by witnesses, uncorroborated by anything in writing, or any facts surrounding the transaction, such evidence should be looked to carefully by the jury," which instruction was given, with the following qualification: "But the declarations and representations of the defendant, in regard to the quality or condition of the land, during the trade, are important evidence, and should be considered by the jury;" Held, That both the instruction and the qualification were properly given to the jury.

INTEREST.

1. The fact that a bond for the delivery of property attached in the suit, is filed with the papers in the cause, upon which a witness is surety, is not such notice of interest in the witness as will preclude the party against whom he is called, from objecting to the witness on the ground of incompetency, after he has been sworn and examined in chief, in part. Veiths v. Hagge, 163

- 2. While objections to the competency of a witness should, in general, be taken before he is examined in chief, yet hey may be made at any time during the trial, if made as soon as the interest or incompetency of the witness is discovered. *Ib.*
- 3. Where a suit is brought in the name of a school district, on a promissory note, made payable to certain persons by name, as school directors, and their successors in office, the fact that the note is made payable to them and others as directors, in the absence of any showing that the payees have a direct legal interest in the note, does not show that they have such an interest as renders them incompetent as witnesses. School District No. Two, &c. v. Rogers, 316.
- 4. Where the plaintiff claims a certain sum as due, and prays judgment for the amount, with interest, he may take judgment for the amount claimed, with interest from the time of the commencement of the action. Ferry v. Page, 455.

JUDGMENT.

- 1. Where an action was commenced before a justice of the peace, against the makers of a joint promissory note, one of whom was served with notice, and against whom judgment was rendered, for want of an appearance, and where a bond for an appeal was filed, signed by the makers of the note, and another party, and recited that W., (against whom the judgment was rendered), had appealed from a judgment, &c., in an action wherein A. is plaintiff, and M. are defendants; and where the justice certified that, "defendants filed their appeal bond, with J. M. as surety, which was approved by me, and appeal allowed;" and where it was objected that it was error to render judgment against M., for the reason that he was not served with notice, and there was no judgment against him before the justice, and that no such appeal bond was ever filed; Held, 1. That as M. was one of the sureties upon the appeal bond, the plaintiff was entitled to judgment against him; 2. That while the bond did not refer to the proceeding with critical accuracy, yet that there was no irregularity that could prejudice the appellants. Alkins v. McCready et al., 214.
- Where the plaintiff, at the November term, 1856, of the Dubuque district court, recovered a judgment against the defendant for about the sum of \$1,000; and where, at the July term, 1858, a motion was made by the plaintiff to correct the record of said judgment, in such a manner as to show that plaintiff's mechanic's lien was established upon a certain tract of land, describing it-which motion was sustained; and where it appeared from the record, that in 1855, plaintiff filed his petition; that afterwards other papers were filed, all of which were lost or mislaid; that the affidavit of plaintiff was filed, to the effect, that his petition, among other things, contained a prayer for a mechanic's lien, as well as for judgment upon his claim; that due notice of said motion had been given to the attorneys for the defendant, and that they made no objection to the granting of the motion; and that it appeared to the court that said application was reasonable, and substantial justice required the correction of said entry; Held, That under the circumstances of the case, the court, in correcting the judgment, did not exceed the power conferred by section 1580 of the Code. Henley v. The Dubuque Gas Light & Coke Co., 274.
- 3. Where the judgment of a justice of the peace is reversed upon writ of error, the cause should be remanded to the justice, or a trial de novo awarded in the district court. Garvin v. Wells, 284.

JURISDICTION.

- 1. Section eleven of article one of the constitution of 1857, did not deprive the district court of jurisdiction of offenses, indictable under section 2612 of the Code, committed prior to the taking effect of the act entitled "An act qualifying the criminal jurisdiction of justices of the peace," approved March 12, 1858. The State v. Church, 252.
- 2. The act entitled "An act qualifying the criminal jurisdiction of justices of the peace," approved March 12, 1858, did not take away the jurisdiction of the district court, already attached, nor affect any proceeding already commenced in such court, under section 2612 of the Code. Ib.
- 8. In larceny, the jurisdiction of the district court, as well as that of justices of the peace, is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of a jury. Ib.
- 4. The statute of 1858, qualifying the criminal jurisdiction of justices of the peace, as well as the constitution, had in view the alleged, and not the ascertained, value of the property stolen, as conferring jurisdiction. 1b.
- 5. Where the jurisdiction of the district court has once attached, it cannot be taken away by the finding of a jury, that the value of the property stolen did not exceed twenty dollars. 1b.
- 6. While the statute of 1858, qualifying the criminal jurisdiction of justices of the peace, makes the offense of larceny, where the value of the property stolen does not exceed twenty dollars, cognizable before justices of the peace, it does not take from the district court its power to punish in cases of conviction before it, where the value of the property stolen is ascertained by the jury not to exceed that sum. 1b.
- 7. Where an indictment for larceny, found at the November term, 1857, of the district court, and tried at the October term, 1858, charged the larceny of a heifer, of the value of twenty-five dollars, on the 14th day of October, 1857; and where the jury found the defendant guilty, and that the value of the property was fifteen dollars; Held, That the district court had jurisdiction of the offense. Ib.
- 8. The service of an original notice against a railroad company upon the track master of the company, where it appears that the corporation has officers, is not sufficient to give the court jurisdiction of the company. Richardson & Co. v. The Burlington & Mo. River R. R. Co., 269.
- 9. A party who is the legal owner of real estate, attached as the property of another person, who is a non-resident, has no right to be made a party defendant to the suit on his own motion: nor is he a proper party in order to oust the court of jurisdiction as to the other defendant. Loving v. Edos, 427.

JURY.

- 1. Section six of chapter 133 of the Laws of 1858, entitled "An act to amend chapter 96 of the Code," was intended to meet the case where all the persons summoned as grand or petit jurors, fail to attend, or where it is determined by the court, that, for any cause, they were illegally elected and drawn. The State v. Pierce, 231.
- 2. The act entitled "an act to amend chapter 96 of the Code," approved March 22, 1858, (Acts of 1858, 257), does not repeal section 1647 of the Code, by express words, nor is there any conflict between the two.



The latter governs where a sufficient number of jurors fail to attend. and the former, where all fail, or where the selection and drawing were illegal. Ib.

- 3. Where to an indictment for forgery, the defendant pleaded that all of the grand jurors summoned by the sheriff, under the precept issued to him, did not attend at the time appointed, and thereupon the court directed the sheriff to complete the panel, by selecting talesmen, and prayed that the indictment be set aside, to which plea a demurrer was sustained; Held, That the demurrer was properly sustained. Ib.
- 4. In the absence of any statutory rule, the order of proceedings in challenging petit jurors, may be properly left to the discretion of the judge trying the cause; and such discretion will not be interfered with, unless it is clearly made to appear that it has been abused. Ib.
- 5. Where on the trial of an indictment, the district attorney challenged a juror peremptorily, and then the defendant one; and where, the panel of jurors being filled, the defendant insisted that the state should exercise a second peremptory challenge, if any more were to be made, which the court refused, and required the defendant to challenge the second time, before the state exercised the right, holding that upon his failure to do so, the defendant would waive the privilege as to one juror; Held, That the rule adopted by the court was fair and equitable. Ib.
- 6. The fact that a person called as petit juror, on the trial of an indictment, in which the defendant is charged with stealing a horse, was a member of "an association or organized company, for the prosecution of persons generally, arrested for horse stealing," will not disqualify the juror. The State v. Wilson, 407.
- 7. Where on the trial of an indictment, in which the defendant was charged with stealing a horse, the defendant propounded to a petit juror an interrogatory as follows: "Do you belong to any association or organized company in this county, for the prosecution of persons generally, arrested for horse stealing?" which being objected to, was asked as follows: "Do you belong to any association existing in this county, to prosecute this, (and other cases), on charge of horse stealing?" which was also objected to; and where the court sustained the objection, but allowed the juror be interrogated in the following form: "Are you a member of any organization existing in this county, or elsewhere, engaged in prosecuting this case?" Held, 1. That the court did not err in sustaining the objections to the interrogatories of the defendant; 2. That the shape in which the question should be put to the juror, was a matter within the discretion of the court, and that the discretion had not been improperly exercised.
- 8. Where a person called as a petit juror in a criminal case, being interrogated as to cause, stated that he had heard considerable in relation to the case, but had not formed an unqualified opinion as to the guilt or innocence of the defendent, from what he had heard; that he had formed an opinion as to the guilt or innocence of the defendant; that if what he had heard, and upon which he had formed his opinion, should be proved upon the trial, he had now an opinion made up; that he did not think he had any prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and testimony; and that he had no bias on his mind, which would influence his mind as a juror; and where the defendant then challenged the juror for cause, which challenge was overruled by the court; *Held*, That the challenge was properly disallowed. The State v. Sater, 420.
- Where a defendant in a criminal case seeks to set aside a verdict against him, on the ground that one of the jurors, previous to the trial, had

formed or expressed an unqualified opinion that he was guilty of the offense charged, he must show by the record that the juror was examined upon oath, as to whether he had formed such opinion; and if it is not thus shown, there is no ground for a new trial. The State v. Shelledy, 477.

- 10. On a motion to set aside a verdict in a criminal case, on the ground that one of the jurors had, previous to the trial, expressed an opinion as to the guilt of the defendant, the affidavit of the defendant is not sufficient to show that the juror was examined under oath, before he was sworn as a juror, to ascertain whether or not he had formed or expressed such an opinion. Ib.
- 11. It is not necessary that it should appear from the records of a cause, that the district court, at each adjournment during the progress of the trial, admonished the jury, that it was their duty not to converse among themselves, on any subject connected with the trial, nor to form or express any opinion thereon, until the cause was finally submitted to them. It.
- 12. In a criminal case, it is sufficient cause of challenge to a petit juror, on the part of the state, that he testifies under eath, that he thought he had formed or expressed an unqualified opinion, or belief, that the defendant was guilty or not guilty, of the offense charged; and it need not appear, in order to constitute a good cause of challenge, that the opinion or belief, formed or expressed by the juror, was in favor of the prisoner.
- 13. The question as to the propriety of recalling a petit juror, who has been challenged, and excused from the jury box, for the purpose of permitting the other party to cross-examine him, and thus disprove the challenge, is within the discretion of the district court; and that discretion will not be controlled by the supreme court, unless it be shown to have been greatly abused. Ib.
- 14. In a criminal case, it is a sufficient cause of challenge, by the state, that a petit juror had formed an unqualified opinion; and no useful purpose is obtained by allowing the juror to state whether the opinion was favorable or unfavorable to the state. Ib.
- 15. In the absence of any statutory direction, the order of challenging petit jurors, and the mode of proceeding in filling up the panel, is left to the discretion of the district court; and unless there has been gross abuse of this discretion, there is no call for the interference of the appellate court. (WRIGHT, C. J., dissenting.) 1b.
- 16. In the absence of any rule of law upon the subject of challenging petit jurors, and filling up the panel, it is to be presumed that the district court has adopted a rule of its own, and that the same has been followed in impanneling the jury; and where this has been done, no such prejudice has resulted as to require a reversal of the judgment, unless the discretion of the court in the premises is shown to have been greatly abused. (WRIGHT, C. J., dissenting.) 16.
- 17. Where in a criminal case, a petit juror was challenged by the state, on the ground of implied bias, and being sworn as a witness for the purpose of proving the challenge, stated that he had formed or expressed an unqualified opinion or belief, that the defendant was guilty or not guilty of the offense charge!; and where the defendant asked the juror whether the unqualified opinion that he had formed was favorable or unfavorable to the state—which question the court refused to permit the juror to answer, and decided that the testimony was sufficient, Vol. VIII.—79

Digitized by Google

and allowed the challenge; Held, That there was no error in the ruling of the court. Ib.

LARCENY.

- 1. In larceny, the jurisdiction of the district court, as well as that of justices of the peace, is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of a jury. The State v. Church, 252.
- 2. The statute of 1858, qualifying the criminal jurisdiction of justices of the peace, as well as the constitution, had in view the alleged, and not the ascertained, value of the property stolen, as conferring jurisdiction. 1b.
- 8. Where the jurisdiction of the district court has once attached, it cannot be taken away by the finding of a jury, that the value of the property stolen did not exceed twenty dollars. Ib.
- 4. While the statute of 1858, qualifying the criminal jurisdiction of justices of the peace, makes the offense of larceny, where the value of the property stolen does not exceed twenty dollars, cognizable before justices of the peace, it does not take from the district court its power to punish in cases of conviction before it, where the value of the property stolen is ascertained by the jury not to exceed that sum. *Ib*.
- 5. Where an indictment for larceny, found at the November term, 1857, of the district court, and tried at the October term, 1858, charged the larceny of a heifer, of the value of twenty-five dollars, on the 14th day of October, 1857; and where the jury found the defendant guilty, and that the value of the property was fifteen dollars; Held, That the district court had jurisdiction of the offense. Ib.
- 6. Where under an indictment for larceny, in which the defendant was charged, among other things, with taking certain promissory notes, for the payment of money, commonly called bank notes, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of larceny in taking the money in the indictment mentioned, and fix the amount and value of the same at \$127 80;" Held, That the verdict was sufficiently formal. The State v. Bond, 540.
- 7. In an indictment for larceny, in stealing a bank note, it is sufficient to describe it as a promissory note, for the payment of money, commonly called a bank note, purporting to be issued by a bank, (naming it), for the payment of a certain sum of money, still due and unpaid, and of a certain value. Ib.
- 8. Bank notes are made the subject of larceny, by the statutes of the state of Iowa. Ib.
- 9. Where under an indictment for larceny, in which the defendant was charged with stealing certain money and bank notes, the court instructed the jury as follows: "That-if a man, under the honest impression that he has title to the property, takes it into his possession, it is not larceny; but if there be an act of concealment, it indicates a knowledge that his claim is unfounded. If the circumstances show that the defendant acted in good faith, under a claim of title in himself, he is exempt from the charge of larceny, although his claim has no foundation in right. The cases in which this principle has been settled, have been those in which property other than money, was the subject of the taking, and where a title to the specific article was set up. It will be necessary for us to inquire how far the principle will apply, where money is taken. No claim of title to the particular money taken, is alleged to have been set up; but

the claim was, that the amount taken was due in services. If the claim had been asserted to C. & R., (the persons from whom the property was taken), before the time of the taking, and there was no evidence of concealment, the fact that money was taken, would not vary the principle. It would not be larceny. If the jury are satisfied, from the testimony, that the defendant was in the employment of C. & R.; that there was nothing due him for services; that he secretly took this money, belonging to them. and from their money-drawer, with the intention to keep it, and convert it to his own use; and that he made the entries in the books, and placed the letter, setting up a claim for services, in them, intending to leave the state, and further intending that the books and entries should not be discovered until after he left the state, it will be your duty to find him guilty. If the jury believe from the testimony, that the defendant took the money on Saturday, and at a time when, in the ordinary course in which the business of C. & R. was conducted, the taking would not be discovered until Monday morning, and that defendant intended to leave on Saturday, and intended that the letter which he left in the books, should not be discovered until after his departure, it will be your duty to find him guilty;" Held, That the instructions were sufficiently favorable to the defendant. Th.

LEWDNESS.

22. To render a defendant liable under section 2709 of the Code, for lewdness, the indictment should charge that the parties were not married to each other. The State v. Clinch, 401.

LIMITATION, STATUTE OF.

- 1. To any action of right, or action brought to recover real estate, commenced after the first day of July, 1856, the period of ten year's limitation is a bar. Kilbourne v. Lockman, 380.
- 2. The Code makes ten years the limitation in actions for the recovery of real estate, but where the cause of action had accrued before, section 1672 allowed the plaintiff one-half that time, or five years after the Code took effect, with the qualification (by section 1673), that he should not have more time in all than was allowed by the pre-existing law—that is, that only so much of the five years was allowed as would make the twenty years, but it could, in no case, go beyond the twenty years. Ib.
- 3. Where in an action of right, the defendant pleaded, First. An adverse possession in himself, and those under whom he claimed, for ten years prior to the commencement of the suit; and, Second, That the plaintiff had not brought his action within ten years from the time when his right of action accrued, to which pleas a demurrer was sustained; Held, That the court erred in sustaining the demurrer. Ib.

MANSLAUGHTER.

- 1. The common law definition of manslaughter, has not been changed by the Code of Iowa. The State v. Shelledy, 477.
- 2. Where on the trial of an indictment for murder, the court instructed the jury as follows: "Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied. It differs from murder in this—that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet malice, either express or implied, which is the very essence of murder, is presumed to be



wanting; and if, therefore, in doing an unlawful act, or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter—provided such unlawful act, or design, be not a felony, because then, the law implies the existence of malice. But if the intent goes no further than to commit a bare trespass, it will be manslaughter; Held, That the directions of the court as to what constituted manslaughter, was as favorable to the defendant, as he could in reason require to be given. Ib.

MECHANIC'S LIEN.

- 1. To entitle a party to a mechanic's lien, under section 981 of the Code, it is not sufficient to show that he furnished the materials, without proof to establish the further fact, that it was upon a contract, and that they were furnished especially, or for the purpose of being used for or about a building. Coles & Davies v. Shorey, 416.
- 2. In such a case, the contract need not be in writing, nor need it be proved by direct and positive testimony, but the jury should be satisfied that such agreement existed, and that the materials were delivered, or furnished, pursuant to it. Ib.
- 3. The law contemplates a contract or agreement more specific, than the mere purchase of the materials in the ordinary course of trade, and that the parties shall mutually understand that they are to be used, and are furnished to be used, about the erection or reparation of a building. Ib.
- 4. Where the materials are sold to the vendee, and he obtains them for the purpose of erecting a house, or other building, and where this is the mutual understanding, or agreement of the parties, the vendor will be entitled to a lien, although the particular house was not understood or mentioned. *Ib*.
- 5. The words "especially for any building," in section 981 of the Code, means materials furnished for building or repairing purposes, as contradistinguished from a furnishing for general, or unknown purposes, rather than that the material shall be furnished especially for any particular building. *Ib*.
- 6. Where in an action for a mechanic's lien, the plaintiff asked the court to instruct the jury as follows: "That if the jury believe from the evidence, that the plaintiffs sold the materials charged in the account, for the purpose of erecting a house, though the particular house was not then understood by the parties; and if the jury also believe that said materials, or any part thereof, were used by the defendant in erecting the house described in plaintiff's petition, the jury will find for the plaintiffs, and establish their lien as prayed, for such amount of said materials as the jury believe were so used in the construction of said building; and the purpose for which the said materials were sold, may be proved by circumstances, from which such purpose may be inferred, or by an express contract to that effect," which instruction the court refused to give, and gave an instruction containing substantially the converse of said proposition; Held, That the court erred in refusing to give the one, and in giving the other instruction. 1b.

MINERAL LAND.

1. In mineral lands, the surface—the soil, as adapted to cultivation—may be separated from the mineral right, or the right to dig under the surface for ore; and it is consistent with the nature and adaptation of the

the property, that one should hold one of these rights, whilst another person is interested in the other. Stewart et al. v. Chadwick et al., 463.

MORTGAGE.

- 1. The single fact that a mortgage of real estate is found upon the records of a county, raises no presumption of its delivery to, and acceptance by, the mortgagee, against the positive and unqualified denial of the mortgagee and those claiming under him, that he ever received such a mortgage, or had any knowledge thereof. Foley v. Howard, 56.
- 2. Nor is the finding of a mortgage upon the records of a county, an acceptance or knowledge of which is denied by the mortgagee, and those claiming under him, presumptive evidence of a prior conveyance of the mortgaged premises, by the mortgagee to the mortgagor, or that the mortgagor had a title which the mortgagee, or those claiming under him would be estopped from denying. *Ib*.
- 3. Acceptance of a mortgage by the mortgagee, is necessary to constitute a delivery; and if there is no delivery, there is no mortgage. Ib.
- 4. To constitute a delivery of a mortgage, there need not be an actual manual delivery of the instrument, by the mortgager to the mortgagee but there must be some act upon the part of both, which, in legal contact plation, would be equivalent to it. 1b.
- 5. Where a party in a state of insolvency, or in contemplation of onsolvency, on his own motion, executes to certain creditors, at the same time without consultation with them, several mortgages and deeds of coust, all his property not exempt from execution—each instrument covering the same property, and reciting that it is subject to the prior conveyance and causes the same to be filed for record on the same day, five minutes time intervening between the filing of each, the transaction constitutes, in legal effect, a general assignment, and not being made for the benefit of all the creditors alike, without any preference of one over another, is void. Burrows et al. v. Lehndorff, 96.
- 6. The execution of a chattel mortgage by a debtor to a creditor, upon property which is subject to prior liens of the same kind, if done by the debtor, without the knowledge or request of the creditor, and if not accepted by him, is not such a giving of property in payment or security of the debt, as the law requires, in order to preclude an attachment. Ib.
- 7. Where in a proceeding to foreclose a mortgage, under chapter 118 of the Code, judgment was entered for the amount found to be due the plaintiff, ordering a foreclosure, and awarding a special execution against the property; Held, That the judgment did not cut off the right of the defendant to redeem before the sale, under the special execution, and followed substantially the provisions of the Code. Duncan v. Hobart et al., 337.
- 8. In a proceeding to foreclose a mortgage, where the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition is due and owing, there is nothing for the plaintiff to prove. Cooley v. Hobart et al., 358.
- 9. The fact that a mortgage was executed to secure the payment of a debt previously contracted, will not invalidate it; nor does it make any difference that it was executed by one of the members of a partnership and his wife, to secure the debts of the firm. Ib.
- 10. Where a petition to foreclose a mortgage, asks a judgment on the note, and a foreclosure of the mortgage, there is no union of law and equi-



ty in one proceeding; and the judgment prayed for is authorized by section 2084 of the Code. Ib.

11. Where a mortgage contains a power of sale, constituting and appointing the mortgagee the trustee, and provides for the notice that is to be given—the place of sale—and all the steps that are to be taken in conducting the sale, and making title to the purchaser, the mortgagee may sell, by giving notice in accordance with the terms of the instrument, and thus foreclose, without proceeding by civil action in the district court. Crocker v. Robertson, 404.

MORTGAGOR AND MORTGAGEE.

- 1. Acceptance of a mortgage by the mortgagee, is necessary to constitute a delivery; and if there is no delivery, there is no mortgage. Foley v. Howard, 56.
- 2. To constitute a delivery of a mortgage, there need not be an actual manual delivery of the instrument, by the mortgagor to the mortgagee, but there must be some act upon the part of both, which, in legal contemplation, would be equivalent to it. Ib.
- 3. A mortgagor of real estate, cannot enjon the foreclosure of a mortgage, executed to secure the unpaid purchase money of the premises, on account of defects in the title with which he is cognizant when he received the deed. Crocker v. Robertson, 404.

MOTION.

- 1. Where a motion is founded on matter outside of the record, it should be verified. Shellenberger v. Ward, 425.
- 2. An action on a premissory note, against the maker and indorser, commenced before a justice of the peace. The indorser appeared before the justice, and moved to dismiss the action, for the reason that he resided in a different township from that in which the action was brought, which motion was not sworn to, and which was overruled. He then sued out a writ of error, and the judgment of the justice was affirmed in the district court; Held, That the motion was properly overruled. Ib.

MURDER.

- 1. Where two or more persons conspire together, to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in the execution of the design. The State v. Shelledy, 477.
- 2. If the unlawful act be a trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a bare trespass, it will be murder in all, although the death happened collaterally, or beyond the original design. 1b.
- 3. Where on the trial of an indictment, in which the defendant and others were jointly indicted for the murder of one W., the court instructed the jury as follows: "That if the jury believe from the evidence that the defendant and others, formed the design of taking the life of the said W., whether by hanging or otherwise; that in pursuance of such design, the defendant and others went in a body to the house of the said W., armed and resolved, and prepared to resist all opposition; that they ob-



tained possession by force or otherwise, of the body of said W., and bound the arms of the said W. so as to render him helpless; that after they had so obtained possession of the said W., the said defendant, and those then engaged with him, or any one of them, in the presence and hearing of said W., avowed their purpose to take the life of the said W. by hanging or otherwise; that they forced the said W. into a hack while thus bound, and started to the timber with him; that while on the road to the timber, and when on the banks of the Iowa river, they cast the said W., while thus bound, into said river, from the said hack, or compelled the said W., by threats, or otherwise, to jump from said hack into said river, and they then and there permitted him to drown, while standing by, and made no effort to rescue the said W., if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree; Held, That the instruction was correct. Ib.

- And where in the same case, the court further instructed the jury as follows: "That if the jury believe from the evidence, that the defendant and other persons formed the design of committing personal violence upon the body of the said W., as by lynching or otherwise, but did not design to take his life; that in pursuance of said design, they went in a body to the house of said W., armed and resolved, and prepared to resist all opposition; that they obtained possession of the person of the said W., and bound his arms so as to render him helpless; that they forced the said into a hack, while thus bound, and started to the timber with him; that before and after they started, one or more thus engaged, in the presence of W., declared that he should be hung, or that he should die before sundown, or otherwise threatened the life of said W.; that while on the road to the timber, and when on the bank of the lowa river, the said W., while thus bound, and in the custody of the said defendant, and others then engaged with him, entertained a reasonable and well-grounded apprehension an apprehension justified by the circumstances—that the said defendant and others then engaged with him, intended to commit personal violence on the said W., or to take the life of the said W., and under that apprehension, sprung from the carriage into the said river, hoping either to escape the threatened violence, or apprehended death, and was then and there drowned-the said defendant, and others then engaged with him, standing by, neither rescuing, nor offering to rescue, the said W., then the said defendant is guilty of murder in the second degree;" Held, That the instruction was sustained by authority. Ib.
- 5. Where death ensues in consequence of the unlawful act of another, it is not necessary that the fatal result should have sprung from an act of commission; but if defendant omitted any act incumbent on him from which death resulted to the deceased, if there was no malice, it is manslaughter—if there was malice, it is murder. Ib.
- 6. An instruction on the trial of an indictment for murder, which omits the element of premeditation, in defining the crime of murder of the first degree, is erroneous. The State v. Johnson, 525.
- 7. Fouts v. The State, 4 G. Greene, 500, commented on and overruled. Ib.
- 8. Where on the trial of an indictment for murder, the court charged the jury as follows: "If you are satisfied from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree;" and where the bill of exceptions recited that the other instructions pointed out the difference between murder of the first and second degree, and manslaughter, but the bill did not show what those instructions were; Held, That it did not appear from the record, that the defend-

ant was not prejudiced, by the omission of the word "premeditated," in the said instruction. Ib.

- 9. Where on the trial of an indictment for murder, the counsel for the prisoner claimed and insisted that the defendant was not guilty, or if so, that the offense was murder of the first degree, and thereupon the court, without objection, charged the jury as follows: "The form of your verdict will be as follows, if you find the defendant guilty: we, the jury, find the defendant guilty of murder in the first degree; or, if you find the defendant not guilty; you will say, we find the defendant not guilty; "Held, 1. That the defendant could not complain of the issue his counsel had presented; 2. That the instruction was not erroneous under the circumstances. Ib.
- 10. Where on the trial of an indictment for murder, the court, in relation to the dying declarations of the deceased, instructed the jury as follows: "If you receive them as true, it will be your duty to find the defendant guilty of murder in the first degree, because they show that it was done, either in the perpetration of, or attempt to perpetrate, a robbery;" and where the court, in response to an interrogatory of the jury, further held: "That if you should believe that the deceased was mistaken as to the object the defendant had in killing, (i. e., for his money), and that all the other declarations were true, and are satisfied, from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree. You can find a verdict of guilty of murder in the second degree, if the murder was willful, and with malice aforethought, though not delibearate and premeditated, provided you are not satisfied that it was committed in the perpetration, or attempt to perpetrate, a robbery. In inquiring into what what was said by the deceased, on the subject of defendant's object in inflicting the wound, you may inquire whether he meant to say, that a robbery had been committed, or whether he referred to the intention of defendant in making the assault;" Held, That taking the instructions together, the first was not objectionable, or at least, not so much so as to alone justify a reversal of the cause.

MUSCATINE.

- 1. The object of the act entitled "An act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, (Laws of 1856, 49), is sufficiently expressed in its title; and the said act is not in violation of section 26 of the third article of the constitution of 1846, which provides that "every law shall embrace but one object, which shall be expressed in its title." Morford v. Unger, 82.
- 2. The seventh section of the act entitled "An act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, which provides that the act shall take effect from and after its acceptance by the city council of Muscatine, and its publication at the expense of the city, is not a delegation of its powers by the general assembly to the people, or to any other tribunal, and does not render the act invalid under the constitution of 1846. Ib.
- 8. The act entitled "An act to amend the act to incorporate the city of Muscatine," approved July 14, 1856, takes private property for public use, without compensation, and is unconstitutional and void. B.
- 4. The testimony of a wife, when called as a witness on the part of her husband, in a criminal case, is not to be marked and distinguished from that of other witnesses; she is entitled to be regarded as others are, and to stand free and unembarrassed upon her own character.

2. It is not a valid objection to the admission of a witness in a criminal case, on the part of the state, that his name is not indorsed on the indictment. Ib.

NEW TRIAL.

- 1. In an action ex delicto, against several defendants, it is competent for the court, after the verdict, to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict as to the others. Terpenning v. Gallup et al., 74
- 2. It is perfectly competent for the district court, to order a new trial, when satisfied that an error has been committed, to the prejudice of either party, whether exceptions were taken to the action of the court at the time or not. Farr v. Fuller, 847.
- 3. The correctness of instructions, in most, if not in all cases, depends upon the facts or circumstances developed upon the trial; and where their applicability or irrelevancy is not shown, by a bill of exceptions, embodying sufficient of the testimony, the appellate court cannot determine upon their correctness, nor determine whether the court erred in granting a new trial, on the ground that they were erroneous. Ib.
- 4. Where a defendant in a criminal case seeks to set aside a verdict against him, on the ground that one of the jurors, previous to the trial, had formed or expressed an unqualified opinion that he was guilty of the offense charged, he must show by the record that the juror was examined upon oath, as to whether he had formed such opinion; and if it is not thus shown, there is no ground for a new trial. The State v. Shelledy, 477.

NOTICE.

- 1. Where a party appeals to the district court from the assessment of damages of a jury appointed by the sheriff, under the act entitled an act granting to railroad companies the right of way, approved January 18, 1853, he is in court for all substantial purposes; and if he does not appear and urge his right to a new assessment, and the verdict of the jury is affirmed, he cannot object to the proceedings in the appellate court on the ground of a want of notice. Borland v. The M. & M. R. Co., 148.
- 2. In such cases, the appeal brings the cause to the district court upon its merits, and it becomes immaterial whether the appellant had notice.
- 3. A defective notice of the taking of a deposition, is obviated by an appearance and cross-examination of the witness. Nevanv. Roup, 203.
- 4. The supreme court cannot take judicial notice of the provisions of a city ordinance. Garvin v. Wells, 284.
- 5. Where a defendant in a criminal case before a justice of the peace, appeals from the judgment of the justice to the district court, he should give the district attorney notice of the appeal, ten days before the next term of the district court; and upon his failure to do so, the appeal may properly be dismissed. The State v. Moran, 399.
- 6. A notice of appeal from the district to the supreme court, cannot be served, and the proof thereof made by affidavit, by the party appealing. Marion Co. v. Stanfield et al., 406.

Vol. VIII.-80



- 7. The Code does not authorize such a mode of service of the notice of appeal. Ib.
- 8. After an appeal is taken to the supreme court, the opposite party is not bound to take notice of what may be done in the cause in the district court. *Eno* v. *Hunt*, 436.
- 9. When a cause is pending in the appellate court, it is irregular and improper to make any move in it in the court below, without notice to the adverse party. Ib.
- 10. A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust. Stewart et al. v. Chadwick et al., 468.
- 11. Where an agreement has been made in good faith, with the express intention of settling prior disputes, the parties cannot go behind it; and a purchaser from one of the parties, with notice of the contract, takes subject to the settlement. Ib.

OCCUPYING CLAIMANT.

- 1. The proceedings authorized by chapter eighty of the Code, were designed to enable the occupying claimant of land, under color of title, who has, in good faith, made valuable improvements thereon, and who is afterwards, in the proper action, found not to be the rightful owner thereof, to have his improvements appraised, that he may obtain payment therefor, or in default of such payment being made, in the time fixed by the sourt, to enable the claimant to acquire the title to the land, by paying to the owner its appraised value, aside from the improvements. Dungan v. Von Puhl, 253.
- 2. As indispensable to the remedy designed to be afforded by the statute in relation to occupying claimants, it is required that the value of the laud, aside from the improvements, as well as the value of the improvements themselves, shall be ascertained by the jury, unless such value shall be agreed upon by the parties. *Ib*.
- 3. When the appraisement is made, no personal judgment for the ascertained value of the improvements, can be rendered by the court against the owner of the land. Ib.
- 4. It is not the intention of the statute, in relation to occupying claimants, that a personal judgment should be rendered in favor of either party, or that the lands or improvements should be ordered to be sold to pay such judgment. Ib.
- 5. Where in a proceeding by an occupying claimant, to recover payment for his improvements, the petition prays judgment for the value thereof against the defendant, the court possesses no power to render such a judgment; and the rendition of such a judgment, without questioning the right of the court, is not a waiver of all objections to such a judgment by the detendant; nor is he precluded from objecting to such a judgment, for the first time, in the appellate court. Ib.
- 6. Upon rendering judgment, under the law in relation to occupying claimants, for the value of improvements upon land, owned by another, the court possesses no power to order that the land be sold under a special execution to be issued on the judgment. Ib.
- 7. While the act entitled "An act to amend chapter eighty of the Code, approved March 23, 1858, is made to apply to judgments rendered previous to its passage, it cannot have the effect to render valid, a judgment in personam against the owner of land, for improvements made thereon by an

occupying claimant, nor an order for the sale of the land under a special execution to be issued on such judgment. Ib.

- 8. Where land is enclosed, and put in a state suitable for cultivation, and the raising of crops, a value is added to the land above the mere cost or value of the improvements put upon it; and the occupant may reasonably be charged a fair sum for the use and occupation of the land in its improved state. In such a case, he pays rent, not upon the improvements, but upon the land, worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation. Ib.
- 9. In cases under the law in relation to occupying claimants, the owner is entitled to the rents and profits according to the value of the land, for the purpose to which it is devoted by the occupant; and the occupant is to pay what the use of the land is worth to him. Ib.
- 10. Under our statute, the occupant of land, under color of title, who is found not to be the rightful owner thereof, is to be paid for valuable improvements made by him in good faith—their value to be ascertained by their worth at the time the appraisement is made; and as resulting from this rule, he should not be charged with the rent of the improvements made by him, but should pay whatever the land has been worth to him. 1b.
- 11. The estimate should be made upon all the land brought into a state of cultivation by him, and suitable for the raising of crops, or for farming purposes, but no rent is to be charged for the use of buildings or farm fixtures erected by the occupant; and a deduction is to be made for any injury done to the land, by cutting timber, or otherwise, by the occupant while in his possession. Ib.

ORIGINAL NOTICE.

1. Where in a suit commenced before a justice of the peace, the original notice informed the defendant that the plaintiff claimed of him a certain sum, as money due her for the labor of her son, A., and that the amount claimed was justly due her as the balance of accounts for said labor of her son; Held, That the original notice sufficiently stated the plaintiff's cause of action, and that there was no error in permitting the plaintiff, in the absence of a bill of particulars, to give evidence under it, to show an indebtedness to her from defendant, for the work of her son, A. Cain v. Devitt, 116.

PARENT AND CHILD.

- 1. The right of a father to recover for the seduction of his minor daughter, has not been changed by the Code, but the rule has been so relaxed that he may now recover, although such minor daughter be not living with him, and there may be no actual loss of service. Updegraff v. Bennett, 72.
- 2. Under the Code, the mother, as the natural guardian of the person of a minor son, where the father is dead, is entitled to recover for the services of the son. Cain v. Devitt, 116.
- 8. Where in an action by a widow, to recover for the services of her minor son, the defendant asked the court to instruct the jury as follows: "That the mother, on the death of the father, is not entitled to recover for the earnings of her minor child, and cannot maintain an action therefor in her own name," which instruction the court refused to give; Held, That the instruction was properly refused. Ib.



PARTNERSHIP.

- 1. The creditor of one partner may levy upon the interest of his debtor in the partnership. Hubbard v. Curtis et al., 1.
- 2. But the creditors of the firm, are entitled to be first satisfied from the partnership funds, and these parate creditors from the individual funds. Ib.
- 3. This latter rule, however, is only applied where there is a deficiency in one of the funds. Ib.
- 4. Where a partnership is insolvent, or where its solvency is doubtful, a court of equity will restrain a sale of the partnership property under an execution against an individual member of the firm, until the settlement of the partnership affairs, in order to ascertain whether the debtorpartner has a real and valuable interest over and above the liabilities of the firm. Ib.
- 5. But whether the sale be stayed until the partnership accounts be settled in equity, or not, the purchaser at an execution sale against a member of the firm, takes only the interest of the judgment debtor in the partnership; and takes it as the partner held it, subject to the payment of the partnership debts. Ib.
- 6. Where an execution against a member of a firm, is levied upon the partnership property, the officer is not entitled to take possession of such joint property; nor where the interest of the debtor in the firm, is sold before a settlement of the partnership affairs, does the officer deliver over the property to the purchaser. Ib.
- 7. In such a case, the purchaser takes nothing more than an interest in the partnership, which is not tangible, and cannot be made available, except under an account between the partner and the partnership; and the purchaser will be restrained from proceeding to obtain possession of the partnership property until such an account has been taken. 1b.
- 8. Where partnership property is levied upon to satisfy an individual debt of a member of the firm, a stay of the sale under the execution is not allowed, on the ground that the interests of the other partners will be affected by such sale, but is granted to ascertain and protect the rights of the joint creditors. 16.
- 9. Nor is an account taken in such cases, solely to ascertain whether there is a separate interest in the debtor partner; but it being found that the joint effects are insufficient, or only sufficient, to meet the demands of the partnership creditors, the object is to protect the joint creditors, and direct the funds to their payment. *Ib*.
- 10. In a bill in equity to restrain, by injunction, the sale of partnership property, under an execution against an individual member of the firm, it is not necessary to aver positively that the co-partnership is insolvent. It is sufficient, if from the allegations of the bill, and the facts stated, an alleged insolvency is apparent. Ib.
- 11. Nor is it any ground of objection to such a bill, that the complainant does not seek a stay of the sale, merely to ascertain the debtor's interest in the partnership, but asks a perpetual injunction. The court having cognizance of the case, to take an account of the partnership affairs, and finding it insolvent in fact, must necessarily make the injunction perpetual in the end, since, in such a case, there is no interest remaining in the debtor-partner to sell. *Ib*.



- 12. Where a temporary injunction, staying a sale of partnership property under an execution against an individual member of the firm, was dissolved, and thereupon the property was sold to one of the respondents; and where, on the final hearing of the cause, it was determined that the debtor-partner had no interest in the firm, it being found insolvent, and it was decreed that the purchaser at the sale should restore to the receiver of the partnership, the property so purchased; Held, That there was no error in the proceeding. Ib.
- 13. Where it was objected to a bill in equity, to dissolve a partnership, and settle up its affairs, that no master in chancery had been appointed to take an account of the partnership debts; and where it appeared that the record of the cause was not complete, and the final decree implied that some order was taken to ascertain and settle the partnership debts, the appellate court refused to interfere with the decree. Ib.
- 14. Where a court of equity has made a final decree, dissolving a partnership, and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, proceedings may be taken, with proper notice to the respondents, to ascertain the joint debts of the firm. Ib.
- 15. A bill to restrain the sale of partnership property, under an execution against an individual member of the firm, and for a dissolution and settlement of the partnership, for the purpose of ascertaining the interest of the separate debtor in the firm, may be filed either by the debtor-partner, or the other partners—by the joint or the separate creditors—or by the purchaser himself, where the partnership property has been sold, prior to a settlement of the affairs of the partnership. 1b.
- 16. Where one of two partners sold out to the other—the purchaser taking all the assets of the firm, and assuming the payment of all the liabilities; and where in proceedings between the two partners, under a submission to arbitrators, the arbitrators found that in the keeping of the books of the firm, there had been mistakes, and that the vendor had received credits and cash with which he was not charged, amounting to the sum of \$1,900—among which was the following item: "For credits entered, which he is not entitled to, \$1,431 84"—which sum was awarded to the vendee of the partnership interest; and where it was claimed that the vendee was entitled to recover for only one half of the said sum of \$1,431 84; Held, That the vendee having purchased the interest of his partner, he was substituted to all the rights of the partnership, and whatever either was owing to the firm belonged to him. Tomlinson v. Hammond et al., 40.
- 17. Where in proceedings for the dissolution of a partnership, and for an account of the partnership transactions, the cause is referred, by agreement of the parties, to referees, the referees are bound by the agreement of the partnership, in stating an account between the partners, and they can exercise no discretion in charging the expenses of the partnership. Levi v. Carrick et al., 150.
- 18. Before a final decree can be rendered, dissolving a partnership, it is necessary that the assets should be converted into money, and each partner's balance ascertained and allotted to him. Ib.
- 19. Where in a proceeding for the dissolution of a partnership, the court found that there was due the complainant a certain sum, over and above the amount of his expenses in the business, and the court rendered judgment for that sum in his favor, against "the said partnership;" Held, That the judgment was erroneous. Ib.

- 20. In an action against partners, a service upon one member of the firm is sufficient, and it is not necessary that the return should show that it was served upon the member of the firm employed in the general management of the business. Walker v. Clark et al., 474.
- 21. Each member of a partnership is an agent for all the others in the firm business, and a service upon any member is sufficient. *1b*.
- 22. An affidavit of a member of a partnership, stating that he had been absent, and for that reason was unable to prepare his defense, but containing no excuse as to the other partners, makes no such showing as will justify the court in setting aside a default. *Ib*.
- 23. In an action against two persons alleged to be partners, on a contract signed in the partnership name, service upon one is a service upon the partnership, and sufficient as to each member of the firm. Sanders v. Bentley, 516.

PARTY.

- 1. A person who acts as the mere agent of another in a transaction, ought not to be made a party to a suit, unless he is charged with fraud in the transaction. He has no interest in the suit, and the other parties have a right to his testimony. Lyon v. Tevis, 79.
- 2. Bill to enjoin the collection of a judgment alleged to have been paid. The attorney who obtained the judgment for the plaintiff was made a party respondent. Demurrer to the bill for that reason; Held, That the attorney was an improper party. Ib.
- 3. Where a suit is commenced by attachment, and property levied upon, other creditors cannot, on their own motion, be made parties defendant, on the ground of collusion between the plaintiff and defendant, and permitted to show that the defendant is not indebted to the plaintiff; nor can they be allowed to show that the attachment was wrongfully sued out. Whipple v. Cass, 126.
- 4 A party who is the legal owner of real estate, attached as the property of another person, who is a non-resident, has no right to be made a party defendant to the suit on his own motion; nor is he a proper party in order to oust the court of jurisdiction as to the other defendant. Loving v. Edes, 427.
- 5. The rule excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs; and this rule has not been changed by the Code. Cherry, Guardian v. McCorkle, 522.

PLEADING.

- 1. The pleadings in a cause, unless the contrary appears, make up the issue, with reference to the right of the plaintiff to recover at the time he commenced his action. Allen v. Newberry, 65.
- 2. Where a matter of defense arises after the commencement of the action, it cannot be pleaded in bar of the action generally; but if it arises before plea or continuance, it must be pleaded as to the further maintenance of the suit; if after plea pleaded, and before replication, or after issue joined, then puis darrien continuance. Ib.
- 3. The rule at common law, as to the time and manner of pleading, is not changed by the practice under the Code. Ib.

- 4. Evidence cannot be given of matter arising after the commencement of the action, whether it occurred before or after plea pleaded, unless the foundation has been laid by the proper pleadings. *Ib*.
- 5. Where in an action on a promissory note, the answer "denies that the plaintiff holds against him any such notes as are described in his petition," such a denial, without more, relates to the time of commencing the action; and means only that it is denied that plaintiff holds such notes as are described. 1b.
- 6. Where in an action on a promissory note, commenced in the name of the payee, the defendant relies upon the fact, as a defense, that the plaintiff has transferred his interest in the cause of action, he should plead affirmatively that the note was the property of another, naming him, and that such other person was the real party in interest. Ib.
- 7. Where the record of a cause is so confused that the appellate court cannot act upon it with safety to the rights of the parties, the cause will be remanded, with leave to the parties to replead. Lyon v. Tevis, 79.
- 8. Under the system of pleading provided by the Code, there is no general issue, and a party is required to plead whatever defense he may have. Hogan v. Burch, 109.
- 9. Where in an action for work and labor, &c., the defendant pleaded, first, a denial of the cause of action, and secondly, payment; and where on the trial, the defendant offered to prove, "that the money sued for, so far as the plaintiff has any claim, was not due at the commencement of the suit, which, being objected to, was rejected by the court, upon the ground that the defendant "offered to prove this fact by a special contract;" Held, That the defendant should have pleaded the contract specially, and and that the evidence was properly excluded. Ib.

PLEDGE.

- 1. Delivery and possession is essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing. Nevan v. Roup, 207.
- Where in an action of replevin, to recover the possession of a certain quantity of oats, it appeared that the oats had been grown by S. and his brother, on land rented of defendant; that during the last week in December, 1857, the oats were threshed, and left in rail pens on the land of defendant, where they were grown; that on the first day of January, 1858, S, after setting apart to defendant his portion of the oats, for the rent of the land, which were placed in a separate pen, sold the remainder of the oats to the plaintiff, received payment, and delivered them to him as they were in the said rail pens; and that the land on which the pen with the oats stood, was still in possession of S. at the time of delivery to the plaintiff; and where the defendant claimed to hold the oats under a lien for threshing the same, and as a pledge for the payment of board of the said S. and his brother; and where the court at the request of the plaintiff, charged the jury as follows: "That to constitute a pledge for debt there must be an actual delivery of the property into the possession of the ceditor; and if the oats were purchased by the plaintiff, for a valuable consideration, without notice of defendant's claim, and defendant did not have actual possession from S., the jury must find for plaintiff;" and where the defendant asked the court to instruct the jury as follows: "That if the oats were threshed by the defendant for S., and left in his possession on the land on which he lived, and if S. owed the defendant for thresing the same, and other debts, that defendant had a lien upon the oats until he was paid; and no sale to plaintiff, without actual delivery and

taking out of possession of defendant, could divest him of his right to possession." which instruction was refused: *Held*, 1. That a constructive possession was sufficient to constitute a pledge; 2. That the first instruction was erroneous; 3. That the instruction asked by defendant was properly refused. *1b*.

POSSESSION.

- 1. A party in the constructive possession of real estate, may maintain an action of trespass quare clausum fregit. Terpenning v. Gallup et al., 74.
- 2. In such cases, the general property draws to it the possession, where there is no intervening adverse right of enjoyment. Ib.
- 3. Delivery and possession are essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing. *Nevan* v. *Roup*, 203.
- 4. Where goods are in possession of a bailee for hire, to which, by his labor or skill, he has imparted additional value, he has a lien for his charges thereon, where there is no special contract, inconsistent with such lien; but he has no right to retain them for the payment of "other debts" due him by the bailor, without a special agreement to that effect. Ib.
- 5. It is essential to the bailee's right to a lien upon the goods, until his charges for his labor or skill are paid, that the goods should have been delivered into his possession, for the purpose of such labor and skill. Ib.
- 6. If the bailee parts with his possession, before he is paid his charges, the lien is lost, and will not be reinstated by his again coming into possession of the goods, without the consent or agreement of the bailor. Ib.
- Where in an action of replevin, to recover the possession of a certain quantity of oats, it appeared that the oats had been grown by S. and his brother, on land rented of defendant; that during the last week in December, 1857, the oats were threshed, and left in rail pens on the land of defendant, where they were grown; that on the first day of January, 1858, S., after setting apart to defendant his portion of the oats, for the rent of the land, which were placed in a separate pen, sold the remainder of the oats to the plaintiff, received payment, and delivered them to him as they were in the said rail pens; and that the land on which the pen with the oats stood, was still in the possession of S., at the time of delivery to the plaintiff; and where the defendant claimed to hold the oats under a lien for threshing the same, and as a pledge for the payment of board of the said S. and his brother; and where the court, at the request of the plaintiff, charged the jury as follows: "That to constitute a pledge for debt, there must be an actual delivery of the property into the possession of the creditor; and if the oats were purchased by the plaintiff for a valuable consideration, without notice of defendant's claim, and defendant did not have actual possession from S., the jury must find for the plaintiff;" and where the defendant asked the court to instruct the jury as follows: "That if the oats were threshed by the defendant for S., and left in his possession on the land on which he lived, and if S. owed the defendant for threshing the same, and for other debts, that defendant had a lien upon the oats until he was paid; and no sale to plaintiff, without actual delivery, and taking out of possession of defendant, could divest him of his right to possession," which instruction was refused; Held, 1. That a constructive possessionwas sufficient to constitute a pledge; 2. That the first instruction was erroneous; 8. That the instruction asked by defendant was properly refused. Ib.
 - 8. While section 1397 of the Code gives a widow the right to petition

for an assignment of her dower, at any time after twenty days from the death of the husband, yet this right does not control the right of possession, which remains as at common law. Cavender v. Smith et al., 360.

- 9. Where a widow's right to the possession of real estate comes under the law of dower only, and not under the law in relation to the homestead, she cannot claim possession by virtue of the latter. *Ib*.
- 10. To constitute an adverse possession, it is not essential that the possession should be in the party personally and solely, in order to enable him to plead it in an action of right, but it is sufficient if it be in him, and those through whom he derives title—they claiming title. Kilbourne v. Lockman, 380.

PRACTICE IN CIVIL CASES.

- 1. Where a matter of defense arises after the commencement of the action, it cannot be pleaded in bar of the action generally; but if it arises before plea or continuance, it must be pleaded as to the further maintenance of the suit; if after plea pleaded, and before replication, or after issue joined, then puis darrien continuance. Allen v. Newberry, 65.
- 2. Where the record of a cause is so confused that the appellate court cannot act upon it with safety to the rights of the parties, the cause will be remanded, with leave to the parties to replead. Lyon v. Tevis, 79.
- 3. Where it is assigned as error that the court allowed certain interrogatories to be propounded to a witness and answered, the material inquiry is, not whether an improper question was asked, but was improper and illegal testimony received by the answer; and unless the answer is disclosed by the record, it is unnecessary to inquire into the correctness or incorrectness of the questions themselves. Thurston v. Cavenor, 155.
- 4. Where the action is brought upon a mere money demand, and the amount for which judgment should be rendered, a mere matter of computation, the damages may be properly assessed by the clerk. Cameron, Adm'r, v. Armstrong, 212.
- 5. Where a petition claims a sum certain from the defendant, with interest, it is not error to render judgment for a greater amount than the sum claimed. Ib.
- 6. Where a cause is tried by the court, without a jury, and the finding of the court is in writing, and all the testimony is set out in the record, the appellate court may review the finding of the court below, in like manner as it may re-examine the verdict of a jury, on a motion to set aside the verdict, on the ground that it is not supported by the evidence. Snell v. Kimmell, 281.
- 7. Where a cause is tried by the court, without a jury, and the finding of the court is reduced to writing, and all the testimony, with the exceptions of the party complaining, is set out in the record—all of which is signed by the judge who tried the cause, the paper is to be treated as a bill of exceptions. *Ib*.
- 8. Where the judgment of a justice of the peace is reversed upon writ of error, the cause should be remanded to the justice, or a trial de novo awarded in the district court. Garvin v. Wells, 284.
- 9. When a petition is filed, an action is so far commenced, that a writ of attachment may issue, before the original notice is placed in the hands of the sheriff for service. Hogan v. Burch, 809.

Vol. VIII.—81



- 10. Under the system of pleading provided by the Code, there is no general issue, and a party is required to plead whatever defense he may have. Ib.
- 11. The refusal of the court to give a defendant the opening and close of the case, on the ground that he has admitted the demand of the plaintiff, and set up new matter, is not a ground upon which to base an appeal, nor upon which error can be assigned. Goodpaster v. Voris et al., 334.
- 12. Where a party to a suit is present in court, he may be called upon as a witness, without being served with a subpœna, but the court cannot compel him to testify; and if he refuses to testify, he must submit to the alternatives provided by sections 2421 and 2422 of the Code. *Ib*.
- 13. Where a party amends his pleadings, after a demurrer has been sustained to his answer, he waives the right to object in the appellate court to the ruling of the court in sustaining the demurrer; and where the second answer admits, under oath, the correctness of the plaintiff's claim, this rule should be rigorously enforced. Duncan v. Hobart et al., 337.
- 14. The question whether two persons are rightly sued jointly in the county where one of them resides, cannot be tried by taking issue upon the facts stated in the affidavit of one of them, for a change of venue, on the ground that he resides in a different county than that in which the suit was commenced. Lyons v. Frazier, 349.
- 15. Where a motion is founded on matter outside of the record, it should be verified. Shellenberger v. Ward, 425.
- 16. Where the property in a promissory note is transferred during the pendency of a suit upon it, there is no legal objection to the substitution of a new plaintiff; but in such a case, the rights of the defendant remain unaffected, and his defense unabridged. Ferry v. Page, 455.
- 17. In case of the substitution of a new plaintiff, where the property in the cause of action has changed since the commencement of the suit, it is not necessary that the new plaintiff should derive his right by, through, or under the original plaintiff. Ib.
- 18. Where the plaintiff claims a certain sum as due, and prays judgment for the amount, with interest, he may take judgment for the amount claimed, with interest from the time of the commencement of the action.
- 19. Where a cause, in which no set-off is pleaded, is tried by the court, and the evidence offered by the plaintiff is excluded, on motion of the defendant, there is no question of fact for the court to determine, and the plaintiff may properly ask and take a non-suit. Partridge v. Wilsey. 459.

PRACTICE IN CRIMINAL CASES.

- 1. Where a party is put upon trial for a criminal offense, it is not within the scope of the authority of either the attorney for the state, or of the court, to take the case from the jury, of their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be newly presented; and such a proceeding amounts to an acquittal, and may be pleaded as such. The State v. Callendine, 288.
- To permit either the court, or the attorney for the state, to stop a criminal trial, and bind over or committhe accused, to answer to the same,

or another indictment, at a future time, because the testimony fails. or a witness is wanting. In consequence of his name not being upon the indictment, would be trifling with the accused to a degree which cannot be tolerated. Ib.

- 3. The provisions of chapter 176 of the Code, do not extend the powers of the courts of far as to permit the court to arrest a criminal trial, and discharge the jury, because of the exclusion of a witness, and to hold the defendant to answer to a subsequent indictment for the same offense. *Ib*.
- 4. Where to an indictment for having in his possession forged and counterfeit bank bills, with intent to defraud, knowing them to be counterfeit, the defendant filed a special plea, averring that at a former term of the court, he was legally and regularly indicted for the same offense,; that he pleaded to the indictment, and issue was joined thereon; that a jury was regularly impannelled and sworn, and the trial progressed to the examination of one K. and one M., as witnesses on the part of the state, when, on motion of the court, the indictment was dismissed, and the defendant discharged from the same; and that said proceedings were a bar to further proceedings against him on the present indictment; to which plea a demurrer was sustained by the court; Held, That the court erred in sustaining the demurrer. Ib.
- 5. A party cannot claim the privilege, as a matter of right, to recall a witness, either for the purpose of preparing a bill of exceptions, or for the purpose of impeaching the witness, or to settle the question as to what he did testify to when previously on the stand. The State v. Ruhl, 447.
- 6. Where it only appears from the record, that the district court refused to allow a witness to be recalled, the appellate court is bound to presume that the discretion lodged with that tribunal over such matters of practice, was properly exercised. *Ib*.
- 7. In a criminal case, it is not competent to prove what the prosecuting witness had said upon the subject matter of her testimony, except for the purpose of impeaching her; and when the evidence is offered for this purpose, the way must be prepared by asking her the necessary questions while on the stand; nor is it competent to show what she said she had sworn to. Ib.
- 8. Where it was moved to arrest a judgment in a criminal case, for the reason that the court to which the indictment was presented, was not held at the place fixed by law for holding the same; and where it appeared from the record, that the court-house was in a ruined and dilapidated condition; that the court was first convened at the court-house, and owing to the condition of the same, adjourned to the University building, at which place the court was sitting when the indictment was presented; Held, That sufficient appeared from the record to justify the appellate court in assuming that the court-house, owing to its condition, was an improper place for holding court; and that the county court provided for the use of the district court, the University building, or that the same was provided by the sheriff for the use of the court, upon the failure of the county court to provide a place for holding the court. The State v. Shelledy, 477.
- 9. In a criminal case, where there is a general verdict of guilty, on an indictment containing several counts, if any one of them is good, the judgment will be supported. Ib.
- 10. It is not necessary that it should appear from the records of a cause, that the district court, at each adjournment during the progress of the trial, admonished the jury, that it was their duty not to converse among themselves, on any subject connected with the trial, nor to form or express any opinion thereon, until the cause was finally submitted to them. Ib.



PRACTICE IN CHANCERY CASES.

- 1. Where one of the questions at issue in a cause in equity, involves the character of proceedings in an action at law, and the questions therein at issue, and decided, and the transcript of the proceedings in the action at law, is not made a part of the record, the appellate court can only ascertain what matters were put in issue and decided in the former suit, from the allegations of the pleadings in the chancery suit, not responded to, or expressly admitted by the other party. Lummery v. Braddy, 33.
- 2. Where under a bill to restrain the respondents from flowing water upon the lands of the complainant, by their mill dam, the district court ordered the respondents to remove their dam, and directed that in case the same is not removed within thirty days, the sheriff remove the same; Ileid, That as there was no prayer in complainant's bill to that effect, the court erred in ordering a removal of the dam. Ib.
- 3. Where minor heirs are parties to a petition in chancery, it is not necessary that the petition should show the ages of such minor heirs. Stewart et al. v. Chadwick et al., 463.
- 4. The refusal of the court to strike from an answer in chancery, the affidavit of respondent, or to strike from such an answer redundant matter, is not a subject upon which to assign error. Buel v. Lake, 551.

PRESUMPTION.

- 1. The single fact that a mortgage of real estate is found upon the records of a county, raises no presumption of its delivery to, and acceptance by, the mortgagee, against the positive and unqualified denial of the mortgagee an I those claiming under him, that he ever received such a mortgage, or had any knowledge thereof. Foley v. Howard, 56.
- 2. Nor is the finding of a mortgage upon the records of a county, an acceptance or knowledge of which is denied by the mortgagee, and those claiming under him, presumptive evidence of a prior conveyance of the mortgaged premises, by the mortgagee to the mortgagor, or that the mortgagor had a title which the mortgagee, or those claiming under him would be estopped from denying. *Ib*.
- 3. Where in a suit commenced by attachment, the petition was addressed to the district court of the proper county, and the affidavit for the writ attached to the petition was signed by the affiant, and certified as follows: "Subscribed and sworn to before me, this 26th day of February, 1858, H. B. M., J. P.;" and where it was urged that it did not appear where the affidavit was made; Held, 1. That the presumption was, that the justice administered the oath within the proper county; 2. That the failure to set out more definitely, the county and state where the oath was administered, was an omission which could not materially prejudice the appellant. Snell v. Eckerson, 281.
- 4. In the appellate court, the presumption is in favor of the correctness of the decision of the district court. If there was error in the ruling made, the party complaining should show it. Garvin v. Wells, 286.
- 5. Where it was moved to arrest a judgment in a criminal case for the reason that the court, to which the indictment was presented, was not held at the place fixed by law for holding the same; and where it appeared from the record that the court-house was in a ruined and dilapidated condition; that the court was first convened at the court-house, and owing to the condition of the same, adjourned to the University building, at which place the court was sitting when the indictment was presented;



Held, That sufficient appeared from the record to justify the appellate court in assuming that the court-house, owing to its condition, was an improper place for holding court; and that the county court provided for the use of the district court, the University building, or that the same was provided by the sheriff for the use of the court, upon the failure of the county court to provide a place for holding the court. The State v. Shelledy, 471.

- 6 The appellate court will not presume that the district court undertook to try a defendant, indicted for a criminal offense, without the indictment. Ib.
- 7. It will be presumed that the district court did its duty, and unless the contrary is made to appear affirmatively, the judgment will not be disturbed. Ib.

PROMISSORY NOTE.

- 1. Where in an action on a promissory note, the answer "denies that the plaintiff holds against him any such notes as are described in his petition," such a denial, without more, relates to the time of commencing the action; and means only that it is denied that plaintiff holds such notes as are described. Allen v. Newberry, 65.
- 2. Where in an action on a promissory note, commenced in the name of the payer, the defendant relies upon the fact, as a defense, that the plaintiff has transferred his interest in the cause of action, he should plead affirmatively that the note was the property of another, naming him, and that such other person was the real party in interest. Ib.
- Where in an action on four promissory notes, commenced in the name of the payee, before the defendant answered, there was filed with the papers in the cause, an instrument in writing, as follows: "Whereas, I, T. F. A., have commenced a suit in the district court of D. county, to the November Term, 1857, vs. S. N., claiming \$5,000 as money due me on four promissory notes, on which an attachment has been issued: Now, therefore, in consideration of the sum of \$1,500, to me in hand paid by L. N., of the same place, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and set over to the said L. N., for said consideration, said suit, and the claim, &c., and all the interest which I have in and to the same, and any judgment I may recover in said district court, in said cause; and authorize the said L. N., in my name and stead, to prosecute said suit in my name and stead to final judgment, and receipt for the same to the said S. N.; and generally to do and perform all acts and things in my name, that may be necessary for him to do, to perfect his judgment lien, and to collect the same, against the said S. N., as fully as I myself could do-he at all times acting only for his benefit, and in his behalf; and I hereby, for the consideration aforesaid, authorize the said L. N. to prosecute the said claim, so in my name as aforesaid, but at his costs—hereby covenanting that I will in no event claim anything that may be recovered in said suit, or that may be obtained in said cause against the said S. N. Witness my hand, this 12th of October, 1857," and which was signed by the plaintiff; and where the defendant answered, admitting the execution of the notes, and denying "that plaintiff holds against him any such notes as are described in his petition;" and where on the trial of the cause, the plaintiff offered the notes in evidence, on which notes there were no endorsements, and thereupon the defendant called the attention of the court to the said assignment on file, and asked that the jury be instructed to find for said defendant, on the ground that the said assignment showed that the suit was not prosecuted in the name of the real party in interest; and

where the court ruled that judgment could not be rendered in the name of the plaintiff, but that he might amend, by substituting the assignee in his place, and take a continuance of the cause, which the plaintiff declined to do, and the court then instructed the jury to find for the defendant; Held, 1. That it was error to instruct the jury to find for the defendant; 2. That the assignment did not invest the assignee with the legal interest in the notes, and was only a transfer of the judgment the assignor expected to recover. *Ib.*

- Where in an action on a promissory note, as follows: \$181 86. Twelve months after date, we, or either of us promise to pay S. & B., or order, one hundred and eighty-one dollars and eighty-six cents, for value received, to draw ten per cent. interest from date, if not punctually paid. February 10, 1857," in which the defendants pleaded usury, the plaintiff called one of the defendants as a witness, who testified that in February, 1857, he executed a note to plaintiffs—he thought about the first of February, but would say about the 4th, 5th, 6th, 7th or 8th—for the sum of \$180 and some cents, or for \$181 and some cents—he thought it was eighty cents; that one M. signed the same as surety; that it was given for \$100, and a note of his own for \$29 80; that the words did not contain any words relating to prompt payment-did not draw ten per cent. interest-nor was there a promise to pay interest; that if there was, he thought he should remember it; that he owed no other note to S. & B.; and that the note was payable in one year from date; and where the court held that the evidence failed to establish the identity of the note, and rendered judgment for the plaintiff for the amount of the note sued on; Held, That the note was sufficiently identified, and that the finding of the court was erro-Snell v. Kimmell, 281.
- 5 Where a note is executed in consideration of a sale of real estate, and it is made to appear that the conveyance was to be made upon the payment of the purchase money, the two acts are so far dependent, that the plaintiff, in an action on the note, must show a performance, or au offer to perform the contract on his part, unless the defendant has waived a tender of the deed. School Dist. No. Two, &c., v. Rogers, 316.
- 6. Where in an action on a promiseory note, it appeared that the consideration of the note was a house and lot, sold by plaintiff to defendant, a deed of conveyance of which was to be made on the payment of the money; and where the court was asked to charge the jury as follows: "That if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof he must show that he has made and tendered, or offered to make and tender, to the defendant, a conveyance of the real estate," which instruction the court refused to give; Held, That the court erred in refusing to give the instruction. 1b.
- 7. A promissory note is not over-due until the days of grace have expired; and the bona fide indorsement of a note on the second day of grace will cut off any equity or set-off, which the maker may have against the payee. Goodpaster v. Voris et al., 384.
- 8. Where a promissory note, dated the first day of September, and payable in ten days after date, was endorsed on the 13th day of September; *Held*, That the note was not over-due when endorsed. *Ib*.
- 9. Section three of the act entitled "An act relating to evidence," approved January 24, 1858, adopts the rule of the commercial law, in relation to the presentment of bills and notes for payment, and repeals the rule upon that subject laid down by section 957 of the Code. Edjar v. Greer. 394.
- 10. The presentment of a bill of exchange or promissory note, for payment, before the last day of grace, is premature, the instrument not being due until then. Ib.

- 11. An action on a promissory note, dated June 16, 1837, payable three months after date, against the makers and indorser. The petition avers presentment to the makers and demand of payment, and protest and notice to the indorser, on the 17th of September, 1857. Demurrer to the petition, for the reason that the note was presented, protested, and notice of non-payment given, before it was due, which was sustained; Held, That the demurrer was properly sustained. 1b.
- 12. A bill in equity to recover on a lost note, or other written instrument, is maintainable on the ground that complainant seeks to obtain a discovery from the re-pondent, as to the instrument lost or destroyed, and also relief consequent upon the discovery. Temple v. Goveet al., 511.

PUBLICATION OF LAWS.

1. Where the general assembly provides that an act shall be published in certain newspapers, and take effect from such publication, and the act is published accordingly, it takes effect from the time of such publication; and where the act thus published corresponds with the original act on file in the office of the secretary of state, it is to be deemed in force, although the act, as published in the session laws, may not correspond with it. The State v. Donehey, 396.

RAILROAD.

- 1. The service of an original notice against a railroad company upon the track master of the company, where it appears that the corporation has officers, is not sufficient to give the court jurisdiction of the company. Richardson & Co. v. The Burlington & Mo. River R. R. Co., 269.
- 2. A track-master of a railroad company, is neither an officer nor a clerk, engaged in the active management of the ordinary business of the corporation, within the meaning of section 1727 of the Code, nor a president or secretary, as provided for in section 17 of the act entitled "an act granting to railroad companies the right of way," approved January 18, 1853. *Ib.*
- 3. A railroad corporation, in legal contemplation, resides in the counties through which its road passes, and in which it transacts its business, and may be sued in any county through which the road passes. Ib.
- 4. Where in an action against a railroad company, commenced in the county of Henry, the defendant moved for a change of venue to the county of Des Moines, on the ground that they were a corporate body, organized under the laws of the state of Iowa, and having their principal place and officers for transacting their business, at Burlington, Des Moines county, and so had at the time this suit was commenced; that the original actice was served on defendants, in said Des Moines county, by service thereof by the sheriff of said county, on J. G. T., treasurer of defendant, at his office in Burlington, and on the track-master in Henry county, and in no other way or manner; and that the present suit is about a matter growing out of, and connected with, the said office, which motion was sustained, and the venue changed accordingly; Held, That the court erred in changing the venue. Ib.

RECEIPT.

 In an action to recover for goods, wares, and merchandise, sold and delivered, the plaintiff offered in evidence his books of account, which contained a charge against the defendant as follows: "To cash, as per receipt, \$50." The defendant objected to the competency of the book to prove the charge for money, which objection was sustained by the court; Held, 1. That the receipt was the best evidence of the payment of the money; and that until it was produced, or its absence accounted for, no lesser grade of evidence could be received; 2. That the books were not competent evidence to prove the payment of the money. Sloan v. Ault, 229.

RECORD.

- 1. In an action of trespass, the defendants justified as president and secretary of a school district, and claimed that in October, 1855, a school house tax was assessed in said district, upon the property therein, including that of plaintiff, and that for the purpose of collecting said tax, they levied upon and sold the property. For the purpose of proving the assessment the defendants offered to prove, by competent witnesses, the loss of certain records belonging to said district, in 1856, and then to prove the contents of said records. The witnesses, in speaking of the records, described them as being kept on half sheets, and quarto sheets of paper, not bound in book form. To all this testimony the plaintiff objected, for the reason that the testimony did not show such a record, as a school district was required to keep, and that the existence and contents of a public record could not be proved by parol; Held, That the evidence was admissible. Higgins v. Reed et al., 298.
- 2. After proof of the loss of a record, its contents may be proved, like any other documents, by secondary evidence. Ib.
- 8. Where the original record is lost, and a copy can be produced, the copy is better than parol evidence of its contents, and its production should be required; but if the existence of better evidence is not disclosed, then the contents may be proved by parol. *Ib*.
- 4. Section 1126 of the Code, is but directory; and the failure of a secretary of a board of directors of a school district, to record all of the proceedings of the board, and of the district meetings, in separate books, to be kept for that purpose, or a record of them upon loose sheets of paper, instead of a bound book, will not render the proceedings of the board or district void, nor make persons subsequently in office liable for the failure of their predecessors to comply with a directory provision of the statute. Ib.

REFEREE.

- 1. Where in proceedings for the dissolution of a partnership, and for an account of the partnership transactions, the cause is referred, by agreement of the parties, to referees, the referees are bound by the agreement of the partnership, in stating an account between the partners, and they can exercise no discretion in charging the expenses of the partnership. Levi v. Carrick et al., 150.
- 2. Where a bill for a dissolution of a partnership charges one or more of the partners with usurpation of the management and control of the business, and with concealment from the complainant of all knowledge of the partnership transactions; and where the bill prays for the appointment of a receiver, &c., and the cause is subsequently referred to referees, it is the duty of the referees to inquire into, and report upon, all the matters in issue between the parties, for the information of the court. B.



RELEASE.

- A release is to be construed according to the particular purpose for which it was made, and a particular recital in such an instrument will restrain its general words. Seymour & Co. v. Butler, 804.
- 2. Where in an action against the defendant, as "one of the late firm of B. & H.," on three promissory notes in the firm name, made in New York, and payable to the plaintiffs at Galena, the defendant pleaded that after the making of the notes, the plaintiffs executed a release as follows: "We, J. L. S. & Co., of the city, county and state of New York, for the consideration of \$300 00, received of J. W. H., (the other partner), of Falls Village, Connecticut, do hereby discharge and release said H. from all notes, debts, dues, accounts and demands due to said company and firm of J. F. S. & Co., and do hereby forever release said H. as partner, or joint and several debtor with W. B., (the defendant), to said firm of J. F. S. & Co. The said H. is hereby individually released from all claims and demands, and also released and discharged as partner, or joint debtor with said B., meaning hereby only to release and discharge the said H. aforesaid," and averred that the plaintiffs thereby fully released and discharged the said notes, and all moneys unpaid thereon, and thereby fully released the same, so that there remains no claim thereon against the defendant; and where the plaintiffs replied denying that the said contract made with H. is a release or discharge of the defendant, or that the same was intended or understood so to be, and alleging that the same was intended to operate as a release of H. only, and not in any way to affect the claim upon the defendant; that the same was made in the state of New York, and not in the state of Iowa, and that it was made in accordance with an express provision of the revised statutes of the state of New York, authorizing a creditor of a partnership firm dissolved, to release or discharge one or more of the partners from all indebtedness, without such release or discharge having the effect to impair the right of the creditor to proceed at law or equity against the other partners not discharged; to which replication there was a demurrer, which was sustained by the court; Held, 1. That the release discharged H. from the notes sued on, but did not release B.; 2. That the demurrer was properly sustained as to so much of the reglication as averred that by virtue of the laws of the state of New York, the release only had the effect of discharging H., and not of discharging B., from the indebtedness. Ib.
- No such effect can be given to the statutes of another state, as that they shall have an extra-territorial operation in furnishing an absolute rule of law for determining, not the validity or construction of a contract sued on, but whether a release made in that state to one partner, shall, or shall not, operate in the state of Iowa, to release and discharge the other. ŀb.

REPEAL.

- 1. The act entitled "an act to amend chapter 96 of the Code," approved March 22, 1858, (Acts of 1858, 257), does not repeal section 1647 of the Code, by express words, nor is there any conflict between the two. The latter governs where a sufficient number of jurors fail to attend, and the former, where all fail, or where the selection and drawing were illegal. The State v. Pierce, 231.
- Section three of the act entitled "An act relating to evidence," approved January 24, 1858, adopts the rule of the commercial law, in relation to the presentment of bills and notes for payment, and repeals the rule upon that subject laid down by section 957 of the Code. Edgar v. Greer, 394. Vol. VIII.—82

3. The sixth section of the act entitled "an act for the suppression of intemperance," approved January 22, 1855, was not repealed by the act supplementary thereto, approved January 28, 1857, and is still in force The State v. Donehey, 396.

REPLEVIN.

- 1. In an action of replevin, where the residence of the plaintiff becomes material; it may be proved without a specific allegation to that effect in the petition. Newell v. Hayden, 140.
- 2. Where property is replevied from an officer, on the ground that it was exempt from execution; and it is sought to show that the plaintiff is a non-resident of the state, and not entitled to the exemption, such defense should be set up by the defendant, rather than rebutted in the first instance, by the plaintiff. Ib.

RESISTING AN OFFICER.

- 1. In an indictment charging the defendant with knowingly and willfully resisting an officer, in attempting to execute legal process, it is not necessary toaver that the officer, at the time, informed the defendant that he acted under the authority of a warrant; nor need the indictment set forth at length the acts of the officer, or show that in making the arrest, he complied, in all respects, with the requisites of the statutes. The State v. Freeman, 428.
- 2. In serving a writ, an officer will be presumed to have discharged his duty, and where a party, who resists the officer, relies on the fact that he omitted to declare the authority under which he acted, it is proper matter of defense. *Ib*.
- 3. In an indictment for resisting an officer in the execution of legal process, the time of the commission of the offense is immaterial, and need not be proved as alleged; and where the time is alleged under a videlicet, it is nugatory, and not traversable, and if repugnant to the fact, does not vitiate the indictment, but the videlicet, itself, may be rejected as surplusage. Ib.
- 4. Where a warrant of arrest, issued under section 2827 of the Code, dated on the 12th of May, 1858, and made returnable on the next day, was offered in evidence on the trial of an indictment for resisting an officer in the execution of legal process; *Held*, That the writ was not illgal and void. *1b*.

RETURN.

1. In action for damages for failing to obey a subpœna, it is not indispensably necessary, that the return of the officer, should show that a copy of the subpœna was delivered to the witness. **McCall v. Butterworth*, 329.

RIGHT.

- 1. A right of dower, where the dower is unassigned, cannot be set up as a defense in an action of right, against the person holding the fee of the land. Cavender v. Smith et al., 860.
- 2. Where in an action of right against the widow and heirs of S., in which the plaintiff claimed under a judgment against the husband and father, the widow pleaded that she was the wife of the said S. at the time of the recovery of the judgment, and continued so to be till the time of

his death, and that she is entitled to dower in the premises, and to the possession of the dwelling-house until her dower is assigned; to which the plaintiff demurred, for the reason that the facts stated in the plea constituted no defense, and that the widow's tile to dower is inchante, until it is set off, which demurrer was sustained; *Held*, That the demurrer was properly sustained. *1b*.

- 3. In an action of right against the heirs of her husband, a widow whose dower is unassigned, is not a proper party defendant; and if made a party, the judgment recovered by the plaintiff cannot affect her right of dower. Ib.
- 4. In an action of right commenced against the ancestor, and to which the heirs are made parties after his death, the heirs are not liable for damages for the rents and profits, while the ancestor was in possession of the premises. They are only liable for such time as they are shown to have been in possession. Ib.
- 5. In such a case, if the plaintiff seeks to recover damages from the ancestor, his administrator should be made a party, with the heirs, or a separate action should be instituted against him. Ib.
- 6. Where in an action of right, the plaintiff claimed title to the premises by virtue of a judgment recovered by S. B & Co, against S., the ancestor. February 17, 1840; a sheriff's sale on the 15th of May, 1841; a sheriff's deed to G. on the 18th of June, 1841; recorded August 18, 1841; and also claimed title under a second sheriff's deed to G., dated October 28, 1843, recorded on the same day, and a deed from G. to the plaintiff, dated May 31, 1844, and recorded on the next day; and where the defendants, to prove title in them, offered in evidence a judgment in favor of P. against the said S., rendered May 29, 1841; an execution thereon, dated June 19, 1845, underwhich the premises were sold by the sheriff, on the 27th of November, 1845, and a sheriff's deed, dated November 24, 1846; and also offered in evidence a second sheriff's deed, dated May 8, 1848, and a deed from W.—the purchaser at said sales—to G. F. S., one of the defendants, dated March 22, 1852, which evidence was rejected; Held, That the evidence was admissible, but that as it did not show any title to the premises in the defendants, the error in rejecting it was immaterial. Ib.
- 7. To any action of right, or action brought to recover real estate, commenced after the first day of July, 1856, the period of ten year's limitation is a bar. Kilbourne v. Lockman, 380.
- 8. Where in an action of right, the defendant pleaded, First. An adverse possession in himself, and those under whom he claimed, for ten years prior to the commencement of the suit; and, Second, That the plaintiff had not brought his action within ten years from the time when his right of action accrued, to which pleas a demurrer was sustained; Held, That the court erred in sustaining the demurrer. Ib.
- 9. Where in an action of right to recover a town lot, which formed a portion of the lands known as the "Half Breed Tract," the defendant pleaded that he held under one J. A., a genuine half-breed, who was entitled, as such, to an interest in said lands, but whose right and claim was not adjudicated in the partition suit decided in 1841, nor at any other time; to which plea a demurrer was sustained; Held, That the plea did not show where the defendant derived his title, nor why the interest of J. A. was not adjudicated, and was bad. 1b.
- 10. In an action of right, the defendant cannot set up in his answer a supposed ground of claim for the plaintiff, and plead to it himself, and put the plaintiff to the necessity of pleading to it also. Ib.

RIGHT OF WAY.

- 1. Upon an appeal from an assessment of damages by a sheriff's jury, under the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853, the cause is to be heard upon its merits, and not upon exceptions taken to the action of the sheriff or jury, or to the competency of either of them to act in the premises. The M. & M. R. R. Co. v. Rosseau, 373.
- 2. In such cases, the appeal is from the assessment of the jury, and in the district court, the inquiry is, whether the owner shall be adjudged, or is entitled to, a greater amount of damages than was awarded him by the sheriff's jury. Ib.
- 3. When the case gets properly into the district court, upon appeal, it is there for trial upon its merits, and for no other purpose: and it is immaterial whether the sheriff selecting the jury, was or was not, the agent of the railroad company; or whether the jury had, or had not expressed opinions adverse to the rights of the owners of the land; nor can the appellant, upon appeal, review the alleged illegal acts of the officers, and have them corrected. Ib.
- 4. Upon appeal from an assessment of damages by a sheriff's jury, under the act granting to railroad companies the right of way, approved January 18, 1853, where it appears from the record that the jury were selected and required "to assess the damages done to each and every piece or tract of land in the county, in all cases not agreed upon with the owners of the land"—that the land owner was notified of the day when the assessment would be made—that on the day of the assessment, he gave notice of an appeal, and filed his bond—and that, afterwards, he filed with the sheriff his exceptions to the report of the jury—it is sufficiently shown that the owner of the land had refused to grant the right of way through his premises, and that the sheriff had power to have the damages assessed by a jury. Ib.

SALE.

1. Where there is an express stipulation in the sale of personal property, that the property shall not be the vendee's until the price is paid, he cannot be regarded as a purchaser, and the title does not pass to him; and a sale of the property by the vendee, while it is in his possession, to a third person, without notice, vests no title thereto in the purchaser. (WRIGHT, C. J., dissenting.) Bailey v. Harris, 331.

SCHOOL DISTRICT.

1. In an action of trespass, the defendants justified as president and secretary of a school district, and claimed that in October, 1855, a school house tax was assessed in said district, upon the property therein, including that of plaintiff, and that for the purpose of collecting said tax, they levied upon and sold the property. For the purpose of proving the assessment the defendants offered to prove, by competent witnesses, the loss of certain records belonging to said district, in 1856, and then to prove the contents of said records. The witnesses, in speaking of the records, described them as being kept on half sheets, and quarto sheets of paper, not bound in book form. To all this testimony the plaintiff objected, for the reason that the testimony did not show such a record, as a school district was required to keep, and that the existence and contents of a public record could not be proved by parol; Held, That the evidence was admissible. Higgins v. Reed et al., 298.

- 2. Section 1126 of the Code, is but directory; and the failure of a secretary of a board of directors of a school district, to record all of the proceedings of the board, and of the district meetings, in separate books, to be kept for that purpose, or a record of them upon loose sheets of paper, instead of a bound book, will not render the proceedings of the board or district void, nor make persons subsequently in office liable for the failure of their predecessors to comply with a directory provision of the statute. Ib.
- 8. Where in an action of trespass, in which the defendants justified as school officers, and after they had established the contents of a lost record of the school district, showing that a school house tax had been levied in the district in 1855, the detendants offered in evidence a paper in the handwriting of the secretary of the district, (but whether in that of one of the defendants, did not appear), showing the amount of tax due from the several citizens of the district, containing the names of the plaintiffs and others, with memorandums as to who had paid, which paper the bill of exceptions stated, was the only written evidence remaining of the tax list of 1855, to which evidence the plaintiff objected; *Held*, That if the paper offered in evidence, was a copy of the assessment-roll provided for in section 1130 of the Code, or one of the list posted up, as provided for in that section, it was properly admitted in evidence. *Ib*.
- 4. Where there is a failure to collect a school-house tax during the year in which it has been levied, the power and authority conferred by the warrant does not expire with the year, where the tax is levied upon personal property, and not upon real estate; and if the warrant thus issued shall be lost, it may be supplied by a new one, and the right and power of the secretary of the district to collect the taxes, is none the less clear and effective, than if the old warrant was still in existence and produced; nor is such warrant authority to the person in office, at the time of its issue, alone, but it protects equally his successor. Ib.
- 5. And in such a case, though no second warrant should issue, if the officer can show that one was issued, and establish its loss, he may protect himself by proving its contents. Ib.
- 6. Where in an action of trespass, the defendants justified the taking and sale of the property, as school officers, in payment of a school house tax, it appeared that the tax was voted by the district in October, 1855, and duly advertised; that the records were lost in 1856; and that in June, 1857, the president of the district, one of the defendants, issued his warrant to the secretary, the other defendant, authorising and commanding him to collect the taxes so levied and advertised, and also a listadvertised in December, 1856, under which warrant the property was sold; and where the defendants offered the said warrants in evidence, to which the plaintiff objected, for the reason that it purports to be issued in June, 1857, directing that the collection of taxes levied in 1855, the record of the levy havidre was admissible. Ib.
- 7. In an action of trespass against the officers of a school district, for the taking and sale of personal property, in payment of a school-house tax, the defendants may offer in evidence a bond for the delivery of the property, executed by the plaintiff. Ib.

SCHOOL FUND COMMISSIONER.

1. Section 330 of the Code, does not include the bond of the school fund commissioner, required by section 1090 of the Code; and it is not

necessary that the bond of that officer should be approved by the county judge. The State, for the use of, &c., v. Fredericks et al., 553.

- 2. Chapter 68 of the Code was intended to furnish all the rules upon the subject of "qualifications for office" by the fund commissioner. Ib.
- 3. In an action on a school fund commissioner's bond, it is not necessary, in order to make it a valid statutory bond, to aver and prove in the first instance, that the sureties were approved by the clerk and sheriff of the county. Ib.
- 4. Where the signatures to a school fund commissioner's bond, are undenied, or if denied under oath, are proved, and it is shown to have been made and signed by the officer and his sureties, as a part of his qualification for office; that the officer took the necessary oath, had the same indorsed on the bond, and both filed in the office of the proper clerk; that thereupon he entered upon the duties of the office; and when the bond is found in the possession of the state, and put in suit by her, these things are prima facie evidence that the bond was fully executed and accepted, and until satisfactorily rebutted, entirely sufficient. Ib.

SEDUCTION.

- 1. In an action by a father, to recover damages for the seduction of his minor daughter, the petition need not allege that she was the "unmarried daughter" of the plaintiff, nor that she was of "previously chaste character." Updegraff v. Bennett, 72.
- 2. The right of a father to recover for the seduction of his minor daughter, has not been changed by the Code, but the rule has been so relaxed that he may now recover, although such minor daughter be not living with him, and there may be no actual loss of service. *Ib*.

SERVICE.

- 1. In an action for damages, for failing to obey a subpœna, the question whether it was served or not, is a matter of proof for the plaintiff on the trial. McCall v. Butterworth, 329.
- 2. In such an action, the return of service upon the subpoena, is not conclusive upon the parties; and the plaintiff is entitled to show on the trial, as a matter of fact, independent of the return of the officer, that the writ was duly and legally served. *Ib*.
- 3. A notice of appeal from the district to the supreme court, cannot be served, and the proof thereof made by affidavit, by the party appealing. *Marion Co.* v. Stanfield et al., 406.
- 4. The Code does not authorize such a mode of service of the notice of appeal. Ib.
- 5. In an action against partners, a service upon one member of the firm is sufficient, and it is not necessary that the return should show that it was served upon the member of the firm employed in the general management of the business. Walker v. Clark et.al., 474.
- 6. Each member of a partnership is an agent for all the others in the firm business, and a service upon any member is sufficient. Ib.
- 7. In an action against two persons alleged to be partners, on a contract signed in the partnership name, service upon one is a service upon the partnership, and sufficient as to each member of the firm. Sanders v. Bentley, 516.



SET-OFF.

- 1. T. made to F. a written lease for five months, of part of a building in Keokuk, at \$10,00 per month, payable at the end of each month. As this lease was about to expire, it was extended by a new lease in writing, for one year, the rent payable as before, the last clause of which lease provided, that if F. would put up a summer kitchen adjoining the rooms leased, on the south, T. would pay him the cost of it at cash rates, at the expiration of the lease, which lease expired on the 26th of April, 1858. F. built the kitchen, which was finished on the 16th of October, 1857, and on the same day assigned the demand for payment to Z., by writing on the lease as follows: "For value received, I hereby assign to F. Z., all my rights and benefits of the last clause of the within lease, and empower him to collect the cost of said kitchen, and apply the same for his benefit." Z. then sued T. for \$60,00, the cost and value of the said work, and the defendant claimed a set-off of \$50,00 as due him from F., for the last five months' rent of the premises, and \$10,00 for the use of another lot; Held, That the defendant was entitled to set-off the rent against the cost of the kitchen. Zugg v. Turner, 223.
- 2. Where in an action by the indorsee of a promissory note, against the maker, dated the first of September, payable in ten days after date, and indorsed on the 13th of the same month, to which the defendant pleaded a set-off against the payee, the court suppressed a deposition designed to prove the set-off; Held, That the set-off could not prevail against the indorsee, and that the deposition was properly suppressed. Goodpaster v. Voris et al., 334.

SHERIFF'S SALE.

1. A purchaser of real estate at a sheriff's sale, where there is no fraud cannot resist the payment of the purchase money, upon the ground that the judgment debtor had no title, or a defective one, and, therefore, that the bid was without consideration. Cameron v. Logan, 434.

SLANDER.

- 2. It is not true, as a general proposition, that in slander, the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages. Armstrong v. Pierson, 29.
- 8. Where in an action of slander, the court, after stating the different kinds of damages, instructed the jury as follows: "That compensatory damages are given where the words were spoken without malice, but under circumstances which show a want of caution, and a proper respect for the rights of the plaintiff. Compensatory damages are such as will pay the plaintiff for his expense and trouble in carrying on the suit, and disproving the slanderous words;" and where the court afterwards instructed the jury, "that the character of the plaintiff can never be considered, until the jury come to the question of giving vindictive or exemplary damages;" Held, That the latter instruction, taken in connection with the definition of compensatory damages, given by the court, was not erroneous. Ib.

STATUTE.

1. No such effect can be given to the statutes of another state, as that they shall have an extra-territorial operation in furnishing an absolute rule of law for determining, not the validity or construction of a contract

sued on, but whether a release made in that state to-one partner, shall, or shall not, operate in the state of Iowa, to release and discharge the other. Seymour & Co. v. Butler, 804.

- Where in an action against the defendant, as "one of the late firm of B. & H.," on three promissory notes in the firm name, made in New York, and payable to the plaintiffs at Galena, the defendant pleaded that after the making of the notes, the plaintiffs executed a release as follows: "We, J. F. S. & Co., of the city, county, and state of New York, for the consideration of \$300,00, received of J. W. H, (the other partner), of Falls Village, Connecticut, do hereby discharge and release said H. from all notes, debts, dues, accounts and demands due to said company and firm of J. F. S. & Co., and do hereby forever release said H. as a partner, or joint and several debtor with W. B., (the defendant), to said firm of J. F. S. & Co. The said H. is hereby individually released from all claims and demands, and also released and discharged as partner, or joint debtor with said B., meaning hereby only to release and discharge the said H. aforesaid," and averred that the plaintiffs thereby fully released and discharged the said notes, and all moneys unpaid thereon, and thereby fully released the same, so that there remains no claim thereon against the defendant; and where the plaintiffs replied, denying that the said contract made with H. is a release or discharge of defendant, or that the same was intended or understood so to be, and alloging that the same was intended to operate as a release of H, only, and not in any way to affect the claim upon the defendant; that the same was made in the state of New York, and not in the state of Iowa; and that it was made in accordance with an express provision of the revised statutes of the state of New York, authorizing a creditor of a partnership firm dissolved, to release or discharge one or more of the partners from all indebtedness, without such release or discharge having the effect to impair the right of the creditor to proceed at law or equity against the other partners not discharged; to which replication there was a demurrer, which was sustained by the court; Held, 1. That the release discharged H. from the notes sued on, but did not release B.; 2. That the demurrer was properly sustained as to so much of the replication as averred, that by virtue of the laws of the state of New York, the release only had the effect of discharging H., and not of discharging B. from the indebtedness. 1b.
- 3. Where two statutes upon the same subject matter conflict, the one last enacted, must have precedence. Edgar v. Greer, 394.
- 4. Where the general assembly provides that an act shall be published in certain newspapers, and take effect from such publication, and the act is published accordingly, it takes effect from the time of such publication; and where the act thus published corresponds with the original act on file in the office of the secretary of state, it is to be deemed in force, although the act, as published in the session laws, may not correspond with it. The State v. Donehey, 396.

STATUTE OF FRAUDS.

1. Where a party, residing in one place, purchases goods of another, residing at a different place, though an agent at the place where the contract is made, which goods are the property of the vendor, and ready for delivery, to be forwarded by express, and paid for with a secured note, payable in six months, the contract, under section 2409 of the Code, (Statute of Frauds), to be valid, must be evidenced by writing. Partridge v. Wilsey, 459.

SUBSTITUTION.

- 1. After an action has been commenced, the plaintiff may sell and dispose of the judgment he may recover, without investing the person purchasing it, with the legal interest to the *chose in action*; and under such an assignment, it would be improper for the court to substitute the holder of it as plaintiff in the action, with the power to prosecute in his own name. Allen v. Newberry, 65.
- 2. It is entirely competent for a court to discharge the "next friend" of a minor, in whose name an action has been commenced, on his motion, and substitute another to carry on the suit. Thurston v. Cavenor, 155.

SUPPRESSION OF INTEMPERANCE.

- 1. The constitutionality of the act entitled "an act for the suppression of intemperance," approved January 22, 1855, affirmed. The State v. Donehey, 396.
- 2. The sixth section of the act entitled "an act for the suppression of intemperance," approved January 22, 1855, was not repealed by the act supplementary thereto, approved January 28, 1857, and is still in force. It.

TAXES.

- 1. Where taxes are levied under, and by virtue of, a vote of the people authorized by law, a failure on the part of those officers conducting the election, and those whose duty it is, by law, to make the entries, and give the notices, necessary to perfect the vote, will not make the county treasurer liable as a wrong-doer, in the collection of taxes levied under such vote, if authorized by a proper warrant. Games v. Robb, 193.
- 2. A county treasurer, as to justification in levying upon property for the non-payment of taxes, occupies the same position to all taxes, whether general or special; and his protection is as full and complete in the collection of special, as it is in that of general taxes, in reference to the illegality or irregularity of the assessment. *Ib*.
- 3. Where the law authorizes a submission to a vote of the people, as to the levying of a special tax, and there is such a submission in fact, and the result is declared in favor of the proposed tax, the county treasurer is not to be held liable for any failure of the county judge, or other officer, to comply with the directory provisions of the law regulating the manner of conducting the election, or their neglect in making the proper entries. 16.
- 4. Where a tax is levied by a county judge, under section 31 of the act entitled "an act for the public instruction of the state," approved March 12, 1858, for the support of schools within the county, the county treasurer may lawfully collect the same. The Co. of Louisa v. Davison, 517.

TAX LIST.

1. Where in an action of trespass, a county treasurer justifies the taking of personal property, for the non-payment of taxes, under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, he need not set out, with a copy of the warrant, the tax list, nor a copy thereof. An averment, in his answer, of his

Vol. VIII.—83

readiness to produce the tax list, is all that is required. Games v. Robb, 198.

- 2. Where a county treasurer, in justifying an action of trespass, for the taking of personal property, states in his answer that he received the tax list for a given year, with the warrant of the county judge attached, in due form, he need not state more to show the authority under which the list was made, and that he was authorized to collect the taxes within the limits of the county, in the manner prescribed by law. 16.
- 3. Under sections 487, 488 and 492 of the Code, the tax-list, with the warrant of the county judge attached, completely protects the county treasurer against the irregular or illegal proceedings of the officers connected with the levy of the tax. Ib.
- 3. Where in an action of trespass, in which the defendants justified as school officers, and after they had established the contents of a lost record of the school district, showing that a school house tax had been levied in the district in 1855, the detendants offered in evidence a paper in the handwriting of the secretary of the district, (but whether in that of one of the defendants, did not appear), showing the amount of tax due from the several citizens of the district, containing the names of the plaintiffs and others, with memorandums as to who had paid, which paper the bill of exceptions stated, was the only written evidence remaining of the tax list of 1855, to which evidence the plaintiff objected; Held, That if the paper offered in evidence, was a copy of the assessment-roll provided for in section 1130 of the Code, or one of the list posted up, as provided for in that section, it was properly admitted in evidence. Higgins v. Reed et al., 298.

TENDER.

- 1. Where a note is executed in consideration of a sale of real estate, and it is made to appear that the conveyance was to be made upon the payment of the purchase money, the two acts are so far dependent, that the plaintiff, in an action on the note, must show a performance, or an offer to perform the contract on his part, unless the defendant has waived a tender of the deed. School Dist. No. Two, &c., v. Rogers, 316.
- 2. Where in an action on a promissory note, it sppeared that the consideration of the note was a house and lot, sold by plaintiff to defendant, a deed of conveyance of which was to be made on the payment of the money; and where the court was asked to charge the jury as follows: "That if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof he must show that he has made and tendered, or offered to make and tender, to the defendant, a conveyance of the real estate," which instruction the court refused to give; Held, That the court erred in refusing to give the instruction. 1b.
- 3. Where a lot in a town site, entered in pursuance to an act entitled "an act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1853, is wrongfully conveyed by a county judge, the grantee becomes a trustee for the rightful owner; and in order to compel a conveyance from the trustee, it is not necessary for the owner to tender, or offer to pay to the trustee, the amount paid by him to the county judge for the lot. Harris et al. v. Stone, 322.

TIME.

In trespass, the time when the trespass was committed, is not ordinarily material to be proved as alleged—the plaintiff being at liberty to

prove a trespass at any time before the commencement of the action, whether before or after the day laid in the petition. Turpenning v. Gallup et al., 74.

TITLE.

- 1. Where there is an express stipulation in the sale of personal property, that the property shall not be the vendee's until the price is paid, he cannot be regarded as a purchaser, and the title does not pass to him; and a sale of the property by the vendee, while it is in his possession, to a third person, without notice, vests no title thereto in the purchaser. (WRIGHT, C. J., dissenting.) Billey v. Harris, 331.
- 2. To constitute an adverse possession, it is not essential that the possession should be in the party personally and solely, in order to enable him to plead it in an action of right, but it is sufficient if it be in him, and those through whom he derives title—they claiming title. Kilbourne v. Lockman, 380.
- 3. Where in an action of right to recover a town lot, which formed a portion of the lands known as the "Half Breed Tract," the defendant pleaded that he held under one J. A., a genuine half-breed, who was entitled, as such, to an interest in said lands, but whose right and claim was not adjudicated in the partition suit decided in 1841, nor at any other time; to which plea a demurrer was sustained; Held, That the plea did not show where the defendant derived his title, nor why the interest of J. A. was not adjudicated, and was bad. 1b.
- 4. In an action of right, the defendant cannot set up in his answer a supposed ground of claim for the plaintiff, and plead to it himself, and put the plaintiff to the necessity of pleading to it also. Ib.

TRESPASS.

- 1. A party in the constructive possession of real estate, may maintain an action of trespass quare clausum fregit. Terpenning v. Gallup et al., 74.
- 2. In such cases, the general property draws to it the possession, where there is no intervening adverse right of enjoyment. 1b.
- 3. In trespass, the time when the trespass was committed, is not ordinarily material to be proved as alleged—the plaintiff being at liberty to prove a trespass at any time before the commencement of the action, whether before or after the day laid in the petition. Ib.
- 4. Where in an action of trespass quare clausum fregit, the jury rendered a verdict against all of the defendants, among whom was one O.— allof whom moved in arrest of judgment, and for a new trial; and where on the hearing of the motion, the plaintiff asked the court to set aside the verdict as to said O., which was granted, and thereupon the court overruled the motion to set aside the verdict as to the other defendants; Held, That the proceeding was not erroneous. Ib.

TRUSTEE.

1. Where a debtor undertakes to dispose of all his property for the benefit of his creditors, giving a preference, he being insolvent, or in contemplation of insolvency, the fact that he has failed to appoint a trustee, as contemplated by law, will not render the assignment valid, as against creditors objecting to it. Burrows et al. v. Lehndorff, 98.

- 2. Where a trustee, acting for others, sells an estate, and becomes interested in the purchase, the cestui que trust is entitled, in a court of equity, to set aside the purchase, and have the property re-exposed for sale. The Bank of the Old Dominion v. The Dubuque and Pacific R. R. Co., 277.
- 3. Whether the cestui que trust be an infant or an adult, and whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate. Ib.
- 4. In such a case, in order to set aside the sale, the cestui que trust is not bound to prove, nor the court to judge, that the trustee has made a bargain advantageous to himself. Ib.
- 5. It is to guard against the uncertainty of the cestui que trust being able to prove fraud in the sale, and the hazard of abuse, as well as to remove the trustee from temptation, that the rule permits the cestus que trust to come, at his own option, and without showing actual injury, insist upon having the experiment of another sale. Ib.
- The plaintiff loaned to the defendant, \$20,000, for which it gave its obligations, in the shape of acceptances, payable at its office in the city of New York, in ninety and one hundred and twenty days, and to secure the payment of the same at maturity, according to agreement, forwarded to the plaintiff thirty-four "Land Grant Construction Bonds," of said defendant, of one thousand dollars each, to be held by the plaintiff as collateral security for the payment of the money loaned. The acceptances were not paid at maturity, but were protested for non-payment, and remain wholly The plaintiff sent the bonds of the defendant to the city of New York, with directions to have them sold at the stock exchange in said city, at public outcry, to the highest bidder, and directed a friend to see that the interests of the plaintiff were protected in the sale. Upon due notice to the defendant, the bonds were sold as directed, and the whole of them bid in for the plaintiff at the sum of \$5,477 86. In an action on the acceptances, to recover the balance due, after deducting the amount realized by the sale of the bonds; *Held*, 1. That the plaintiff had power to sell the bonds for the payment of the debt, and that a sale to a third person would have passed the property; 2. That the plaintiff itself could not become the purchaser, and nothing passed by the form of a sale at auction in which the bonds were bid in by the plaintiff; 8. That the bonds must be considered as still held by the plaintiff, under its original title, as collateral security for the payment of the money borrowed by the defendant. Ib.
- 7. Where a lot in a town site, entered in pursuance to an act entitled "an act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1858, is wrongfully conveyed by a county judge, the grantee becomes a trustee for the rightful owner; and in order to compel a conveyance from the trustee, it is not necessary for the owner to tender, or offer to pay to the trustee, the amount paid by him to the county judge for the lot. Harris et al v. Stone, 322.
- 8. A trustee does not possess the right to continue to hold the trust interest in himself, unless it is so provided in the creation of the trust; and a conveyance of it to the cestui que trust may be enforced by a court of equity. Stewart et al. v. Chadwick et al., 463.
- 9. A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust. 2b,

VENDOR AND VENDEE.

1. Where a vendor of real estate, to which he retains the legal title,

and for which hechas executed a bond for a deed, assigns a promissory note, received in consideration of the sale of said land, and agrees that the assignee shall be substituted to the benefit of all security held by him, the assignee of the note, upon its non-payment, is entitled to the same rights as the vendor himself; and he may file a bill in his own name against the vendee, and all persons claiming under him, with notice, for a fore-closure and sale of the premises. Blair & Co. v. Marsh et al., 144.

- 2. In such a case, the vendee is to be regarded as a mortgagor; and he and those claiming under him, with notice, cannot raise the objection that the complainant is a mere assignee, and that the relation of vendor and vendee does not exist between them. Ib.
- 3. Bill of foreclosure, alleging that in May, 1857, the defendant, L., sold to his co-defendant, M., certain lots in the town of Mount Pleasant, at the price of \$3,000; that one half of the purchase money was paid, and for the remainder M. executed his two promissory notes for \$750 each, payable January 1, and March 1, 1858; that it was agreed that L. should retain the title of the lots until the notes were paid, and give to M. a title bond for a conveyance, on the payment of the balance of the purchase money; that on the payment of the \$1500, and the execution of the notes, M. was put in possession of the lots; that M., being indebted to B. O. & Co., for money borrowed, as collateral security for the payment of the same, assigned to them the title bond of L.; that before the second note became due, the complainant purchased and took an assignment of the same from L., without recourse, and looking solely to said lots as the security for the payment of the same; that it was then agreed between them, that the complainant should succeed to the benefit of all the security held by L., for the payment of the same; that the note is due and unpaid; and that M. is wholly insolvent. The bill makes L., M. and B. O. & Co., parties, and prays that M. ma, be required to perform his agreement with L.; that in default thereof, all the interest of M. and B. O. & Co., in the lots, may be foreclosed, and sold to satisfy his claim; and that on the payment of the same, L. may be required to convey the lots to the purchaser. Demurrer to the bill by M. and B. O. & Co., for the reason that complainant was a mere assignee of L., and that the relation of vendor and vendee did not exist between complainant and themselves, which was sustained; Held, 1. That the right of L. to foreclose against M. for the non-payment of the note, was a quality incident to the debt, which passed by the assignment of the note, and the agreement between L. and the complainant; 2. That the complainant possessed the rights of L., and could foreclose in the same manner, in his own name; and, 3. That the court erred in sustaining the demurrer. Ib.
- 4. Where a vendor becomes liable to a vendee, for the defective quality of goods sold, whether his liability arises through fraud or breach of contract, the measure of damages is the difference in value between goods corresponding with the representations made, and those actually delivered; and the same rule applies where there has been fraudulent misrepresentations in the sale of real estate. Likes v. Baer, 368.

VENUE.

- 1. Where a party to an action before a justice of the peace, files his affidavit, and moves for a change of venue, on the ground that the justice is so prejudiced against him, that he cannot obtain justice before him, it is error to refuse a change of venue. Berner v. Frazier, 77.
- Where in an action against a railroad company, commenced in the county of Henry, the defendant moved for a change of venue to the coun-

ty of Des Moines, on the ground that they were a corporate body, organized under the laws of the state of Iowa, and having their principal place and officers for transacting their business, at Burlington, Des Moines county, and so had at the time this suit was commenced; that the original notice was served on defendants, in said Des Moines county, by service thereof by the sheriff of said county, on J. G. T., treasurer of defendant, at his office in Burlington, and on the track-master in Henry county, and in no other way or manner; and that the present suit is about a matter growing out of, and connected with, the said office, which motion was sustained, and the venue changed accordingly; Held, That the court erred in changing the venue. Richardson & Co. v. The Burlington & Mo. River R. R. Co., 260.

- 3. The question whether two persons are rightly sued jointly in the county where one of them resides, cannot be tried by taking issue upon the facts stated in the affidavit of one of them, for a change of venue, on the ground that he resides in a different county than that in which the suit was commenced. Lyons v. Frazier, 349.
- 4. An action of trespass against two defendants, F. and T., commenced in Alamakee county. At the return term, F. filed a motion for a change of the venue of the cause, as regarding himself, to Clayton county, for the reason that he was a resident of that county, and averring in his motion, that he did not jointly with T., commit the trespass complained of; that whether guilty of committing the act singly and alone, he neither admits nor denies; and that T. was sued jointly with him, for the purpose of compelling him to come to trial in Alamakee county, and not because the said T. was guilty. The plaintiff demurred to the motion. The court overruled the demurrer, and informed the plaintiff that he could take issue on the facts stated in the motion, and ordered a jury to be impanneled to try T. on the issue so presented, which should determine the question of jurisdiction over F. The plaintiff declined to go to the jury on the grounds suggested by the court—whereupon the court discharged T., and ordered a change of venue as to F., and awarded him thirty dollars for his expenses; Held, That the proceeding was erroneous. Ib.
- 5. Where there is nothing to show that the district court has not abused the discretion conferred upon that court, by section 3272 of the Code, in refusing to grant a change of venue, the appellate court cannot interfere. The State v. Barrett, 536.

VERDICT.

- 1. The appellate court will never presume against the correctness of a judgment upon the verdict as to the others. Terpenning v. Gallup et al., 74.
- 2. In an action ex delicto, against several defendants, it is competent for the court, after the verdict, to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict, but always in favor of it. Ib.
- 3. Where in an action on a promissory note, given in part payment for a reaper, in which the defendant claimed a set-off, for money paid on said reaper, at the time of its delivery, and for freight and charges paid upon the same, it appeared that the contract for the sale of the reaper, was as follows: That it was to be delivered at D., to the care of B. & P., on or before the 1st of July, 1855; that the defendant, at the time of the delivery was to pay \$50 00, and the freight and charges, and \$110 00 on the 1st

of March, 1856; that the reaper was warranted to be of good materials—to be well made—not liable to get out of order, with careful usage—and to be capable, with one man and a good team, of cutting and raking off, and laying in gavels, for binding, from twelve to twenty acres of grain per day; that the machine was to be tried at the next harvest; and that if it did not perform as warranted, the defendant was to store and safely deliver to G., H. & Co., the manufacturers, or their agent, &c.; and where it furthr appeared that the reaper remained in the possession of the defendant and had never been returned or delivered to G., H. & Co., or their agent; and where the jury rendered a verdict tor the defendant, for the amount of his set-off, upon which judgment was rendered; Held, 1. That the defendant could not keep the reaper, and at the same time recover the amount paid; 2. That the verdict was erroneous. Williams v. Donaldson, 108.

4. Where under an indictment for larceny, in which the defendant was charged, among other things, with taking certain promissory notes, for the payment of money, commonly called bank notes, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of larceny in taking the money in the indictment mentioned, and fix the amount and value of the same at \$127 80;" Held, That the verdict was sufficiently formal. The State v. Bond, 540.

WARRANT.

- 1. Where there is a failure to collect a school-house tax during the year in which it has been levied, the power and authority conferred by the warrant does not expire with the year, where the tax is levied upon personal property, and not upon real estate; and if the w rrant thus issued shall be lost, it may be supplied by a new one, and the right and power of the secretary of the district to collect the taxes, is none the less clear and effective, than if the old warrant was still in existence and produced; nor is such warrant authority to the person in office, at the time of its issue, alone, but it protects equally his successor. Higgins v. Reed et al., 298
- 2. And in such a case, though no second warrant should issue, if the officer can show that one was issued, and establish its loss, he may protect himself by proving its contents. Ib.
- 3. Where in an action of trespass, the defendants justified the taking and sale of the property, as school officers, in payment of a school house tax, it appeared that the tax was voted by the district in October, 1855, and duly advertised; that the records were lost in 1856; and that in June, 1857, the president of the district, one of the defendants, issued his warrant to the secretary, the other defendant, authorising and commanding him to collect the taxes so levied and advertised, and also a listadvertised in December, 1856, under which warrant the property was sold; and where the defendants offered the said warrants in evidence, to which the plaintiff objected, for the reason that it purports to be issued in June, 1857, directing that the collection of taxes levied in 1855, the record of the levy having been lost before the issuing of the said warrant; Held, That the evidence was admissible. Ib.
- 4. Where a warrant of arrest, issued under section 2827 of the Code, dated on the 12th of May, 1858, and made returnable on the next day, was offered in evidence on the trial of an indictment for resisting an officer in the execution of legal process; *Held*, That the writ was not illgal and void. The State v. Freeman, 428.
 - 5. A magistrate issuing a warrant of arrest, under section 2827 of the

Code, for reasons appearing sufficient to him, may direct that the person arrested be brought before him for examination on the day succeeding the date of the writ. Ib.

WITNESS.

- 1. When the question as to the admissibility of a witness is intended to be raised for the determination of the appellate court, it should appear from the bill of exceptions, not only that the objection to the admissibility of the witness was overruled by the court, but that the witness was sworm, and gave evidence material to the issue. Willey v. Hall, 62.
- 2. While objections to the competency of a witness should, in general, be taken before he is examined in chief, yet they may be made at any time during the trial, if made as soon as the interest or incompetency of the witness is discovered. Veths v. Hagge, 163.
- 3. If the incompetency of a witness is first discovered during the examination in chief, it is not too late then to object to him on the ground of incompetency. Ib.
- 4. The fact that a bond for the delivery of property attached in the suit, is filed with the papers in the cause, upon which a witness is surety, is not such notice of interest in the witness as will preclude the party against whom he is called, from objecting to the witness on the ground of incompetency, after he has been sworn and examined in chief, in part. Ib.
- 5. It is not a valid objection to the admission of a witness in a criminal case, on the part of the state, that his name is not indorsed on the indictment. The State v. McClintock, 203.
- 6. Where the name of L. H. Mason was indorsed on the indictment, as a witness on the part of the state, and on the trial, the state called Levi H. Mason, to whom the defendant objected, for the reason that his name was not upon the indictment, and no notice had been given, as required by the act entitled "An act amending section 2918 of the Code," &c., approved March 22, 1858, which objection was overruled, and the witness permitted to testify: Held, That the objection was properly overruled. The State v. Pierce, 231.
- 7. Where a suit is brought in the name of a school district, on a promissory note, made payable to certain persons by name, as school directors, and their successors in office, the fact that the note is made payable to them and others as directors, in the absence of any showing that the payees have a direct legal interest in the note, does not show that they have such an interest as renders them incompetent as witnesses. School District No. Two, &c. v. Rogers, 316.
- 8. Where a witness is a party to a suit in which his attendance is required, no technical objection to the regularity or sufficiency of the subpoena should be suffered to prevail, in a suit to recover damages for failing to obey the same. McCall v. Butterworth, 829.
- 9. Where a party to a suit is present in court, he may be called upon as a witness, without being served with a subpoens, but the court cannot compel him to testify; and if he refuses to testify, he must submit to the alternatives provided by sectious 2421 and 2422 of the Code. Goodpaster v. Voris et al., 334.
- 10. The testimony of a wife, when called as a witness on the part of her husband, in a criminal case, is not to be marked and distinguished from that of other witnesses; she is entitled to be regarded as others are,

and to stand free and unembarrassed upon her own character. The State v. Rankin, 355.

- 11. In an action on an open account, in the name of an assignee, where the assignment is bona fide, and without recourse, and where no set-off, or cross claim against the assignor is pleaded, the assignor is a competent witness to prove the account. Platt & Co. v. Hedge, 386.
- 12. An assignor of an open account, in an action by the assignee, is a competent witness for the plaintiff, to prove the items of the account where the assignment is bona fide, and the defendant denies the account, and pleads payment. Platt & Co v Hedge, 392.
- 13. Where on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and tokens by which horse thieves are known and recognised by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens. The State v. Wilson, 407.
- 14. A party cannot claim the privilege, as a matter of right, to recall a witness, either for the purpose of preparing a bill of exceptions, or for the purpose of impeaching the witness, or to settle the question as to what he did testify to when previously on the stand. The State v. Ruhl, 447.
- 15. Where it only appears from the record, that the district court refused to allow a witness to be recalled, the appellate court is bound to presume that the discretion lodged with that tribunal over such matters of practice, was properly exercised. *Ib.*
- 16. In a criminal case, it is not competent to prove what the prosecuting witness had said upon the subject matter of her testimony, except for the purpose of impeaching her; and when the evidence is offered for this purpose, the way must be prepared by asking her the necessary questions while on the stand; nor is it competent to show what she said she had sworn to. Ib.
- 17. A grantor of real estate, who conveys by deed of general warranty, is a competent witness for the complainant, in an action against his grantee, to show that the grantor conveyed, by mistake, a greater interest in the land than he possessed, and to enforce the trust against the grantee. In such a case, he is called upon to testify against his interest. Stewart et al. v. Chadwick et al., 463.
- 18. Evidence to impeach a witness is not admissible, where the party has laid no foundation for the impeachment, in his examination of the witness. Ib.
- 19. The rule excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs; and this rule has not been changed by the Code. Cherry, Guardian v. McCork le, 522.

WORK AND LABOR PERFORMED.

- 1. Where one party hires himself to another for a given period of time and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of the services performed, as upon a quantum meruit, without showing that he performed his entire contract, or that he left the service of his employer for good cause. Pizler v. Nichols, 106.
 - But in such a case, where the contract is broken by the fault of the Vol. VIII.—84

party employed, after part performance has been received, the employer is entitled, if he so elect, to set up in defense the breach of the contract, for the purpose of reducing the damages, or showing that nothing is due, and to deduct what it will reasonably cost to procure a completion of the whole service, as well as any damages sustained by reason of a non-fulfilment of the contract. Ib.

- 3. And in such a case, if it is found that the damages are equal to, or greater than, the value of the services rendered, and that the employer, having a right to the performance of the whole contract, has not received any beneficial service, the employed is not entitled to recover. 1b.
- 4. Where in an action to recover for work done and performed, it appeared that the plaintiff was hired by the defendant, to labor for him for the term of six months, and that he left the service of the defendant at the expiration of four months, and thereupon the court was asked to instruct the jury as follows: "1. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he has no claim upon the defendant for the services rendered; 2. If the plaintiff hired to the defendant for the term of six months, and left the service of the defendant, without cause, before the expiration of the time, he cannot recover anything for his services, although the defendant had paid plaintiff a part of his wages, during the continuance of the service"—which instructions the court refused to give; Held, That the instructions were properly refused. Ib.
- 5. Where a party seeks to recover for work and labor performed under a special contract, which he sets out in his petition, the defendant may show that the work was performed under a special contract differing from that declared upon by the plaintiff. Young v. Jones, 219.
- 6. Where a plaintiff claimed of the defendant \$164 50, and averred that at the special instance and request of defendant, he worked for him ninety-four days, and defendant promised to pay him therefor, \$1 75 per day—all of which was denied by the answer; and where, on the trial, the defendant offered to prove that the work done by plaintiff was done under a special contract, by which he was to pay the plaintiff \$75,00—which testimony was rejected by the court; Held, That the evidence was admissible. 16.
- An action before a justice of the peace, in which the plaintiff claimed to recover for the work and labor of his son, for five and a half months, at ten dollars per month, &c. The defendant answered in writing, denying the plaintiff's claim, and averring that he contracted with plaintiff, for the hire of the service of his son, for one year, at the price of \$75 00; and that the son worked five and a half months, when he was taken away by the plaintiff, who refused to permit him to work for defendant any longer, and claiming damages for the breach of the contract. To this answer no replication was filed. On appeal to the district court, the plaintiff filed a demurrer to so much of the answer, as alleged that the contract was for the labor of the son for one year, &c., which demurrer was sustained, and so much of the answer stricken out; Held, That by sustaining the demurrer, the defendant was deprived of his right to show that he had sustained any damages by reason of the failure of the plaintiff to perform his part of the agreement, which damages he had a right to set-off against the plantiff's claim for compensation for the labor of his son for five and a half months, and that the proceeding was erroneous. (WRIGHT, C. J., dissenting.) Lowen v. Crossman, 325.

-m & 37 31.



HARVARD LAW LIBRARY



